Supreme Court, U.S.
FILED

96 778 NOV 19 1996

OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

WILLIAMS NATURAL GAS COMPANY,
Petitioner,

v.

KANSAS PIPELINE PARTNERSHIP,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of Kansas

PETITION FOR WRIT OF CERTIORARI

GARY W. BOYLE
COUNSEL OF RECORD
THE WILLIAMS COMPANIES, INC.
4100 ONE WILLIAMS CENTER
TULSA, OKLAHOMA 74172
(918) 588-2359

JAY V. ALLEN
THE WILLIAMS COMPANIES, INC.
4100 ONE WILLIAMS CENTER
TULSA, OKLAHOMA 74172

Does a state violate the Fourteenth Amendment's guarantee of due process of law when it provides parties the right to a hearing and then revokes that right by allowing the inaction of a state agency, rather than a decision on the merits, to determine the matter?

LIST OF PARTIES AND RULE 29.1 LISTING

In addition to the parties identified in the caption of this Petition, the following were parties to the action below:

Cities of Ottawa and Paola, Kansas
Citizens' Utility Ratepayer Board
City of Overland Park, Kansas
County of Jefferson County, Kansas
County of Wyandotte County, Kansas
Kansas Attorney General Carla Stovall
Kansas Corporation Commission
Miami Pipeline Company
Panhandle Eastern Pipe Line Company
Western Resources, Inc.

Petitioner Williams Natural Gas Company is a wholly owned subsidiary of The Williams Companies, Inc. Other subsidiaries of The Williams Companies, Inc., that are not wholly owned by that corporation are as follows:

Altra Energy Technologies L.L.C.
American Soda, L.L.P.
Apco Argentina Inc.
Free Port Terminal Co. Limited
Kern River Gas Supply Corp.
Kern River Gas Transmission Co.
Kern River Service Corp.
Kiowa Gas Storage, L.L.C.

Nebraska Energy, L.L.C.
NES Supply Corp.
Northern Border Intermediate Limited Partnership
Northern Border Partners, L.P.
Parkco, L.L.C.
Pekin Energy Co.
Reserveco Inc.
TransNetwork Holding Co.
Tubexpress, Inc.
Williams Field Services-Gulf Coast Co., L.P.
Wiljet, L.L.C.

TABLE OF CONTENTS

LIST OF PARTIES AND RULE 29.1 LISTING ..... (ii)
TABLE OF AUTHORITIES ..... (vi)
OPINIONS 2
JURISDICTION 2
RELEVANT STATUTES 3
STATEMENT OF THE CASE 3
REASONS FOR GRANTING THE WRIT 5
Summary of Argument 5

I. THE LOWER COURTS' APPLICATION OF THE STATUTE VIOLATES CONSTITUTIONAL DUE PROCESS AND CONFLICTS WITH DECISIONS OF THE COURT 5

A. Due Process Requires Notice and an Opportunity to Be Heard 6

B. WNG Was Entitled to Due Process 6

1. WNG Had a Protectible Interest ... 6

2. WNG Did Not Receive Due Process 8

II. THE FEDERAL CONSTITUTIONAL QUESTION PRESENTED BY THIS CASE IS IMPORTANT AND MAY HAVE SIGNIFICANT IMPACT 13

A. The Lower Courts' Decisions Have Significant Economic Impact on Kansas 13

B. This Court's Application of the Fourteenth Amendment Will Have Implications Nationwide 13

CONCLUSION 19

TABLE OF AUTHORITIES

Court Cases

Arnett v. Kennedy, 416 U.S. 134 (1974) 11

Burns v. United States, 501 U.S. 129 (1991) 7

Cleveland Bd. of Educ. v. Loudermill,
470 U.S. 532 (1985) 11

Kansas Pipeline Partnership v. State Corp. Comm'n, 916 P.2d
76 (Kan. Ct. App. 1996) 2, 15

Lawrence Preservation Alliance, Inc. v. Allen Realty, Inc.,
16 Kan. App. 2d 93, 819 P.2d 138 (1992) 11

Logan v. Zimmerman Brush Co.,
455 U.S. 422 (1981) 6, 7, 8, 9, 10

Montana-Dakota Util. Co. v. Public Serv. Comm'n, 102 N.W.
2d 329 (N.D. 1960) 16

Mullane v. Central Hanover Bank & Trust Co.,
339 U.S. 306 (1949) 6, 7

Quill Corp. v. North Dakota, 504 U.S. 298 (1992) 11

Societe Internationale v. Rogers, 357 U.S. 197 (1958) .. 8, 9

United States v. James Daniel Good Real Property,
510 U.S. 43 (1993) 11

Vitek v. Jones, 445 U.S. 480 (1980) 11

Washington v. Walter Harper, 494 U.S. 210 (1990) 7

Statutes and Constitutional Provisions

U. S. Const. amend. XIV 6

28 U.S.C. § 1257 (1993) 2

28 U.S.C. § 2403(b) (1993) 2

Ala. Code § 37-1-81(B) (1996) 16

Alaska Stat. § 42.05.421(a) (1995) 17

Ariz. Rev. Stat. Ann. § 40-256 (1996) 16

Ark. Code Ann. § 23-4-411 (Michie 1995) 16

Cal. Pub. Util. Code § 455 (Deering 1996) 16

Colo. Rev. Stat. § 40-6-111(1)(b) (1996) 16

Conn. Gen. Stat. Ann. § 16-19(b) (1994) 16

Fla. Stat. ch. 366.06(3) (1996) 16

Fla. Stat. ch. 367.081(8) (1996) 16

Ga. Code Ann. § 46-2-25(b) (1996) 17

Haw. Rev. Stat. § 269-16(b) (1995) 17

Idaho Code § 61-622 (1996) 16

Ind. Code Ann. §8-2.1-22-20(b)(c) (Burns 1996) 16

Ind. Code Ann. §8-2.1-22-25(b)(c) (Burns 1996) 16

Iowa Code § 476.6(13) (1995) 17

Kan. Stat. Ann. § 66-117 (1995) 3, 4, 15

Ky. Rev. Stat. Ann. § 278.190(2)
(Michie/Bobbs-Merrill 1995) 16

La. Rev. Stat. Ann. § 45:1163.1(B)(C) (West 1996) . 16, 17

Md. Code Ann. art. 78, § 54F(c) (1995) 17

Md. Code Ann. art. 78, § 70(b)(c) (1995) 17

Me. Rev. Stat. Ann. tit. 35-A, § 310 (2) (West 1995) ... 16

Mich. Comp. Laws § 460.6a (3) (1996) (Mich. Stat. Ann.
§ 22.13(6a)(3) (Callaghan 1996)) 17

Minn. Stat. § 216B.16 (2) (a) (1995) 15

Miss. Code Ann. § 77-3-39(10) (1995) 17

Mo. Ann. Stat. § 387.200 (Vernon 1996) 17

Mo. Ann. Stat. § 392.230(5) (Vernon 1996) 15

Mo. Ann. Stat. § 393.150 (Vernon 1996) 17

Mont. Code Ann. § 69-3-302(2) (1995) 17

Neb. Rev. Stat. § 19-4616 (7) (1996) 15

N.M. Stat. Ann. § 62-8-7(c) (Michie 1996) 17

N.Y. Pub. Serv. Law § 66 (12) (McKinney 1996) 17

N.D. Cent. Code § 49-05-06 (1995) 17

Ohio Rev. Code Ann. § 4909.27 (Anderson 1995) 17

Okla. Stat. tit. 17, § 152(B) (Supp. 1996) 17

Or. Rev. Stat. § 757.215 (1995) 17

66 Pa. Cons. Stat. Ann. § 1307 (f) (5) (1995) 17

66 Pa. Cons. Stat. Ann. § 1308 (b) (1995) 17

66 Pa. Cons. Stat. Ann. § 1309 (b) (1995) 17

S.C. Code Ann. § 58-5-240 (E) (Law. Co-op. 1995) 15

S.D. Codified Laws Ann. § 49-34A-14 (1995) 17

S.D. Codified Laws Ann. § 49-34A-17 (1995) 17

Tenn. Code Ann. § 65-5-203(b) (1995) 17

Tex. Corps. & Ass'ns Code Ann.
§ 2.212(d) (West 1995) 15

Tex. Corps. & Ass'ns Code Ann.
§ 3.211 (d) (West 1995) 15

Tex. Corps. & Ass'ns Code Ann. § 5.08(d) (West 1995) 15

Utah Code Ann. § 54-7-12 (3)(c) (1996) 15

Vt. Stat. Ann. tit. 30, § 227(a) (1996) 15

Va. Code Ann. § 56-240 (Michie 1996) 17

Va. Code Ann. § 56-265.13:6(A) (Michie 1996) 17

Wash. Rev. Code § 80.04.130 (1995) 17

W. Va. Code § 22-2-4a (1996) 16

Wis. Stat. § 196.19(d) (1994) 15

Administrative Materials

Kan. Ann. Reg. § 82-1-225 (1994) 7

Kan. Ann. Reg. § 82-1-228 (1994) 7

KansOk Partnership, Kansas Pipeline Partnership & Riverside Pipeline Co., 73 FERC ¶ 61,160 (1995) 3

Order Setting Hearing & Procedural Schedule, Kan. Corp. Comm'n Docket Nos. 192,391-U; 192,506-U; 192,507-U (May 1995) 7

Order Denying Motion for Reconsideration of May 10, 1995 Order Setting Hearing & Procedural Schedule By KPP, Kan. Corp. Comm'n Docket Nos. 192,391-U; 192,506-U; 192,507-U (May 1995) 7, 8

Order, Kan. Corp. Comm'n Docket Nos. 192,391-U; 192,506-U; 192,507-U (June 1995) 8

Pipeline Serv. Obligations and Revisions to Regulations Governing Self-Implementing Transportation; and Regulation of Natural Gas Pipelines After Wellhead Decontrol, 57 Fed. Reg. 13,267, III FERC Stats. & Regs. Preambles ¶ 30,939, order on reh'g, 57 Fed. Reg. 36,128, III FERC Stats. & Regs. Preambles ¶ 30,950, order on reh'g, 57 Fed. Reg. 57,911, 61 FERC ¶ 61,272 (1992) 18

Prehearing Conference Order, Kan. Corp. Comm'n Docket Nos. 192,391-U; 192,506-U; 192,507-U (August 1995) . . 8

Williams Natural Gas Co.,
71 FERC ¶ 61,115 (1995) 14

No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

WILLIAMS NATURAL GAS COMPANY,

Petitioner,

v.

KANSAS PIPELINE PARTNERSHIP,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of Kansas

PETITION FOR WRIT OF CERTIORARI

Petitioner, Williams Natural Gas Company ("WNG"), seeks a writ of certiorari to review an opinion and order of the Supreme Court of the State of Kansas, which denied review of an order of the Court of Appeals of the State of Kansas holding that the Kansas Corporation Commission's failure to reach a decision on the merits of certain utility applications for changes in the terms of service (the "Applications") within 240 days forever removed the rights of the parties to a decision on the merits.

OPINIONS BELOW

The September 9, 1996, unpublished order of the Supreme Court of the State of Kansas is reprinted at Appendix A.[1] The May 17, 1996, opinion of the Court of Appeals of the State of Kansas is published as Kansas Pipeline Partnership v. State Corp. Comm'n, 916 P.2d 76 (Kan. Ct. App. 1996) and is reprinted at App. B.[2]

JURISDICTION

The Supreme Court of the State of Kansas issued its order on September 9, 1996. App. A. This Petition for a Writ of Certiorari is being docketed in this Court within ninety days from the entry of judgment by that court. This Court's jurisdiction is invoked under 28 U.S.C. § 1257 (1993).

The provisions of 28 U.S.C. § 2403(b) (1993) may apply to this proceeding. The Kansas Corporation Commission and the Attorney General of the State of Kansas were parties below and are being served with three copies of the Petition pursuant to Rules 29.3 and 29.4(c).

---

[1] References to documents reprinted in an Appendix will hereinafter appear in the Petition as "App."

[2] The unpublished opinions of the Kansas Corporation Commission that form the basis for the Lower Courts' orders are reproduced at Apps. C through F.

RELEVANT STATUTES

Pursuant to Rule 14.1(f), WNG has attached copies of all relevant constitutional provisions and statutes as Apps. G through J.

STATEMENT OF THE CASE

This case arises from a decision by the Corporation Commission of the State of Kansas ("KCC") in a docket filed by Kansas Pipeline Partnership ("KPP") seeking approval of five contracts (the "Contracts") with Western Resources, Inc. ("WRI"). The KCC held extensive hearings after exhaustive discovery in which KPP, WNG, KCC Staff, the Kansas Citizens' Utility Ratepayer Board ("CURB"), WRI, and various other parties were active participants. All parties submitted briefs. Before the KCC could issue a final decision, the Federal Energy Regulatory Commission ("FERC") ruled that KPP is part of a single interstate pipeline system subject to FERC's exclusive jurisdiction under the Natural Gas Act.[3] Upon learning of FERC's assertion of jurisdiction, the KCC determined the new jurisdictional status was, in effect, an amendment of the application to approve the Contracts and, on that basis, restarted the 240-day statutory decision period, if that period even applied. Kan. Stat. Ann. § 66-117 (b) (the "Statute") provides that various utility filings will be "deemed approved" if the KCC fails to act within 240 days. The Statute

---

3 KansOk Partnership, Kansas Pipeline Partnership, & Riverside Pipeline Co., 73 FERC ¶ 61,160 (1995).

is reproduced at App. H.[4] The KCC stayed further action in the consolidated dockets. KPP appealed to the Court of Appeals of the State of Kansas ("Court of Appeals") seeking a determination that the Contracts are deemed approved because the KCC failed to issue a final order within 240 days.

The Court of Appeals determined the 240-day time limit contained in the Statute applies to this matter. WNG first raised its constitutional due process arguments in its Motion for Rehearing En Banc with the Court of Appeals. App. J. The Court of Appeals failed to address WNG's arguments. App. B. WNG likewise raised its constitutional arguments in its Petition for Review before the Supreme Court of the State of Kansas ("Kansas Supreme Court"). App. I. The Kansas Supreme Court denied WNG's Petition without addressing the constitutional arguments on September 9, 1996. App. A. This Court should review that determination because the Statute, as applied by the Lower Courts, violates the Constitution's guarantee of due process of law by removing WNG's right to notice and an opportunity to be heard on the merits. WNG urges the Court to grant its Petition and invalidate the unconstitutional interpretation of the Statute by the Lower Courts.

---

[4] Approval of the Contracts does not fall into any of the three clearly defined areas that trigger the Statute's 240-day decision-making time limit. Kan. Stat. Ann. § 66-117 (Supp. 1995). Thus, the Lower Courts' unconstitutional application of the Statute is especially egregious because the Statute should not even have been applied to this proceeding. WNG has not raised issues related to the correct interpretation of the Statute because those issues do not raise important federal questions.

REASONS FOR GRANTING THE WRIT

Summary of Argument

WNG had the statutory right to participate in a hearing on the merits of the Applications. The State of Kansas removed that right without providing WNG due process of law The Kansas decisions violate the Fourteenth Amendment and conflict with decisions of the Court. If the Court allows the Lower Courts' decisions to stand, the citizens of Kansas generally will suffer economic harm. Moreover, the due process issue in this Petition is an important question of federal constitutional law, the resolution of which will have impact nationwide.

I. THE LOWER COURTS' APPLICATION OF THE STATUTE VIOLATES CONSTITUTIONAL DUE PROCESS AND CONFLICTS WITH DECISIONS OF THE COURT.

The Lower Courts' application of the Statute violates the Fourteenth Amendment of the United States Constitution and is inconsistent with the Court's interpretations of procedural due process. The Lower Courts' determination that the 240-day time period for rate cases applies to the approval of these Contracts seriously negated WNG's right to notice. Because the KCC did not require that KPP give the notice and make the filings required for rate cases, no party received the notice prong of procedural due process to which they were entitled. Moreover, by determining the Statute operates to remove the parties' right to a determination on the merits and by effectively cutting off WNG's right to appeal the KCC's interim rulings, the Lower Courts also removed the parties' opportunity to be heard. Because the essence of procedural due

process is notice and an opportunity to be heard, the Lower Courts' interpretation of the Statute rendered it unconstitutional as applied. On review, WNG urges the Court to find that the Lower Courts' interpretation of the Statute violates the United States Constitution.

A. Due Process Requires Notice and an Opportunity to Be Heard.

The United States Constitution provides that the State shall not "deprive any person of life, liberty, or property, without due process of law . . . ."[5] The protection provided by the Due Process Clause requires, at a minimum, "that deprivation of life, liberty, or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case."[6] The Lower Courts' application of the Statute deprived WNG of its property rights without "the opportunity to present [its] case and have its merits fairly judged."[7] Thus, the Lower Courts prevented WNG from enjoying the protections mandated by procedural due process.

B. WNG Was Entitled to Due Process.

1. WNG Had a Protectible Interest.

A complete Due Process Clause analysis presents two inquiries for the Court: (1) was WNG deprived of a protected

---

[5] U. S. Const. amend. XIV. App. G.

[6] Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1949).

[7] Logan v. Zimmerman Brush Co., 455 U.S. 422, 433 (1981).

interest and (2) if so, what process was due?[8] As a competitor of KPP, WNG had a protectible interest in participating in this proceeding.

Kansas law provides WNG with the right, as an interested competitor of KPP, to intervene and participate in KCC proceedings that affect WNG.[9] Because it is grounded in state law, this right is a form of "property" right, to which due process protection must be given.[10] The Logan Court identified two factors that defined Logan's claim as a property right: (1) the "claimant has more than an abstract desire or interest in redressing his grievance" and (2) "its right to redress is guaranteed by the State . . . ."[11] WNG's interests in this proceeding satisfy the first of the Logan factors. WNG's ownership of substantial pipeline assets in Kansas, its employment of 300 Kansas citizens, and its provision of gas transportation services vital to the citizens of Kansas confirm that WNG has more than an abstract interest. Its valuable property rights deserve the protection of the Due Process Clause. Various KCC orders granted WNG party status in the proceedings below.[12] As a party, WNG had the right to fully

---

8 Burns v. United States, 501 U.S. 129, 146-48 (1991); Washington v. Walter Harper, 494 U.S. 210, 228 (1990); Logan, 455 U.S. at 428.

9 Kan. Ann. Reg. §§ 82-1-225, 82-1-228 (1994).

10 Logan, 455 U.S. at 430; Mullane, 339 U.S. at 313.

11 Logan, 455 U.S. at 431.

12 See Order Setting Hearing & Procedural Schedule, Kan. Corp. Comm'n Docket Nos. 192,391-U; 192,506-U; 192,507-U (May 1995) (granting WNG's Motion to Intervene); Order Denying Motion for Reconsideration of May 10, 1995 Order Setting Hearing & Procedural

participate in the KCC's hearing on the merits of the Applications. WNG's party status was sanctioned by state law, clearly satisfying Logan's second factor.

Based on the Logan analysis, WNG's right to participate in the KCC proceeding is a constitutionally protected property right. WNG is therefor entitled to the due process protection provided for by the United States Constitution.

2. WNG Did Not Receive Due Process.

Because WNG had an established property right in the proceedings, the Court must next determine what process was required to protect that right. Generally, the Due Process Clause, as applied to the states by the Fourteenth Amendment, protects litigants who seek to protect property or redress grievances in an adjudicative setting.[13] Several opinions of the Court provide due process analyses of cases analogous to the one presented here and demonstrate that the Lower Courts interpreted the Statute inconsistent with due process.

In Societe Internationale v. Rogers, 357 U.S. 197 (1958), the Court determined that a party's case should not be

---

Schedule By KPP, Kan. Corp. Comm'n Docket Nos. 192,391-U; 192,506-U; 192,507-U (May 1995) (denying KPP's Motion to Require WNG to Identify Its Interest and to Limit Discovery); Order, Kan. Corp. Comm'n Docket Nos. 192,391-U; 192,506-U; 192,507-U (June 1995) (denying KPP's Petition for Reconsideration of May 31, 1995, Order Denying KPP's Motion to Require WNG to Identify Its Interest and to Limit Discovery); Prehearing Conference Order, Kan. Corp. Comm'n Docket Nos. 192,391-U; 192,506-U; 192,507-U (August 1995) (listing WNG as a party).

[13] Logan, 455 U.S. at 429.

dismissed based upon non-compliance with procedural rules. In particular, the Court noted the Due Process Clause limits the power of courts "to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause."[14] In Rogers, the Court found a due process violation when the plaintiff's case was dismissed because of the plaintiff's good-faith failure to comply with a court order. In this case, WNG did not take any action that led to its loss of protection. Instead, the inaction that led to the deprivation of WNG's rights was that of the decision-maker itself. Nonetheless, the Lower Courts' interpretation of the Statute resulted in a complete loss of WNG's right to a decision on the merits and its right to redress procedural and other errors through the established appellate process based entirely on the KCC's inaction. The loss of WNG's due process protection thus resulted from no fault of WNG whatsoever. The Court held that the plaintiff in Rogers was entitled to a hearing on the merits even though the plaintiff was at least partially at fault. Because WNG is faultless here, Rogers teaches that WNG is entitled to a hearing on the merits.

Logan v. Zimmerman Brush Co., 455 U.S. 422 (1981) presents an even more compelling interpretation of the Due Process Clause. There, the Court determined the dismissal of an employment claim violates the Due Process Clause when the claims was dismissed solely because an agency neglected to act within a statutory time requirement.[15] The statute in Logan was similar to the Statute in this case. It required an agency to hold a hearing within 120 days of the filing of a

---

[14] Rogers, 357 U.S. at 209.

[15] Logan, 455 U.S. at 434-35.

complaint.[16] When the agency inadvertently set the hearing date for five days after the statutory period, the claim was challenged by the employer and eventually dismissed.[17] In reversing that determination, the Court held that once a state confers a property right, like the right to a hearing, any statutory limitation on the right will be subjected to constitutional scrutiny.[18]

WNG's situation is nearly identical. The Lower Courts' application of the Statute operated to remove WNG's right to a determination on the merits in the same manner that Logan's rights were barred. Like the agency in Logan, the KCC, through a misunderstanding of the impact of FERC's assumption of jurisdiction, failed to follow the State's procedural guidelines. As in Logan, WNG was not at fault. In fact, WNG was powerless to stop the Statute's application and therefore, powerless to raise its claim that notice was improper or that the Contracts did not merit approval. To deny WNG's right to a decision on the merits and its corollary right to appellate correction of errors by the decision-maker under such circumstances clearly violates the Due Process Clause.

"While the Legislature may elect not to confer a property interest . . ., it may not constitutionally authorize the deprivation of such an interest, once conferred, without

---

[16] Id. at 424.

[17] Id. at 426-27.

[18] Id. at 434.

appropriate procedural safeguards."[19] A property owner's rights "are not diminished by the fact that the State may have specified its own procedures that it may deem adequate for determining the preconditions to adverse official action."[20] WNG's rights were diminished by the Lower Courts' application of the Statute. Because that application violated WNG's due process rights, the Court should grant this Petition and declare the Statute as applied unconstitutional.

The Lower Courts' decision effectively removed WNG's right to notice inherent in its due process rights.[21] WNG filed a motion with the KCC seeking dismissal of the Applications for failure to give the notice required by a rate case and make the filings required in a rate case. At KPP's insistence, the KCC denied WNG's motion and declined to force KPP to give the required notice and make the required filings. That decision necessarily included a determination that this proceeding was not a rate case. The requirements for filings and proper notice apply in a rate case because the KCC must make a prompt decision. In other cases there is no artificial time limit and therefor no similar need for heightened procedural notice. The Lower Courts' determination that the Contracts are deemed approved by operation of law turned this case on its head by applying the strict, punitive time limits of

---

[19] Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 541 (1985) (quoting Arnett v. Kennedy, 416 U.S. 134, 167 (1974)).

[20] Vitek v. Jones, 445 U.S. 480, 491 (1980).

[21] See United States v. James Daniel Good Real Property, 510 U.S. 43, 53 (1993); Quill Corp. v. North Dakota, 504 U.S. 298, 312 (1992) (identifying "notice as the analytic touchstone of due process nexus analysis"); Lawrence Preservation Alliance, Inc. v. Allen Realty, Inc., 16 Kan. App. 2d 93, 819 P.2d 138 (1992).

the Statute in a case where none of the notice and procedural safeguards applied to rate cases have been enforced. The combination of the KCC's failure to require the notice and filings associated with a rate case and the Lower Courts' application of the 240-day time limit had the effect of denying the parties the notice to which they are entitled by the most fundamental concepts of due process.

The KCC's ruling on WNG's motion seeking dismissal of the Applications leads to another important consideration in this case. WNG's exception to the KCC's ruling on WNG's motion remained preserved for consideration on appeal of the KCC's final ruling in this proceeding. The Lower Courts' rulings that the Contracts are deemed approved, merely by the KCC's failure to act, fully, finally, and irrevocably removed WNG's right to appeal the KCC's ruling because it eliminated a final order and WNG's right to appeal from such an order. If WNG had been permitted a right to appeal the KCC's denial of its motion, WNG would have had an opportunity to reverse an approval of the Contracts, even if that decision were based on the Contracts' merits. The Lower Courts' elimination of WNG's right to an appeal on this critical issue amounted to a denial of both WNG's right to notice and its right to a hearing.

II. THE FEDERAL CONSTITUTIONAL QUESTION PRESENTED BY THIS CASE IS IMPORTANT AND MAY HAVE SIGNIFICANT IMPACT.

A. The Lower Courts' Decisions Have Significant Economic Impact on Kansas Citizens.

The Court should grant WNG's Petition because the issue presented is important. The Lower Courts' decisions in this case will have an impact that affects a significant portion of the Kansas population. If the Lower Courts' application of the Statute is allowed to stand and the Contracts remain "deemed approved," Kansas ratepayers could eventually pay for the Contracts' costs through significantly increased gas rates.

As WNG, CURB, KCC Staff, and others set forth at length at the hearing in this matter, the Contracts are unwise and significantly over-priced. Based on the compelling showing on the merits, the KCC would not have approved the Contracts. Had the KCC approved the Contracts on the merits, its decision would have been reversed on appeal either on the merits or on the KCC's failure to require rate case notice. Thus, in its appeal, KPP accomplished by the KCC's omission an end it could not have accomplished by the KCC's volition. The Court should not permit such a result in a matter of such great public importance. Clearly, based upon the magnitude of the costs to be paid by Kansas ratepayers, this appeal presents an issue of great importance to Kansas consumers.

B. This Court's Application of the Fourteenth Amendment Will Have Implications Nationwide.

The due process issue presented in this Petition is not merely an issue of great importance in Kansas. It has broad national importance and will have a significant impact on utilities and consumers. Kansas gas plays a critical and significant role in the interstate natural gas grid. The application of constitutional due process to the KCC's decisions will have a profound effect on the movement of natural gas out of and through Kansas and, as a result, on gas consumers throughout the country. Furthermore, several states have adopted statutory schemes that could be interpreted in the same manner that the Lower Courts interpret the Statute. This case presents an opportunity to clarify the application of constitutional due process to these statutes. Finally, the regulation of utilities is increasingly being transferred to the states. The role of state utility regulators is therefor becoming increasingly important. The states need the guidance of an opinion from the Court concerning the process that is due in regulatory proceedings as the states embark on their heightened regulatory roles.

The Kansas-Hugoton field located in southwestern Kansas is one of the most prolific and important domestic natural gas fields.[22] One company alone produces over 100 billion cubic feet of natural gas annually from the field. No less than eleven interstate and twelve intrastate natural gas pipelines traverse Kansas. Gas production from Kansas is an integral and critical part of the interstate natural gas grid. The national importance of the Kansas-Hugoton field emphasizes the critical nature of the due process issue raised here.

---

[22] Williams Natural Gas Co., 71 FERC ¶ 61,115, at 61,368 (1995).

The KCC is charged with the responsibility for regulating natural gas transportation in Kansas. The importance of Kansas as a gas producing state means that the decisions of the KCC and the procedures that apply to that decision-making process are nationally important. The Court should grant this Petition because resolution of the due process issue presented here will resolve an important constitutional issue with significant national impact.

A review of the statutes effective in other jurisdictions reveals an interesting dichotomy. Several states have adopted a statutory scheme similar to that in effect after the interpretation imposed by the Lower Courts. Kansas, according to the judicial interpretation that is the subject of this Petition, affirmatively requires that a change in rates or other regulated aspects of utility businesses will be "deemed approved" after the passage of a fixed time period thereby removing the parties' right to a decision on the merits of the proceeding.[23] Other states have adopted similar statutes.[24] Statutes of several additional states could be interpreted to include such a provision, although none of those statutes compel the application imposed by the Kansas courts in this

---

[23] Kan. Stat. Ann. § 66-117(a) (Supp. 1995); Kansas Pipeline Partnership v. State Corp. Comm'n, 916 P.2d 76 (Kan. Ct. App. 1996).

[24] Minn. Stat. § 216B.16 (2) (a) (1995); Mo. Ann. Stat. § 392.230(5) (Vernon 1996) (telephone); Neb. Rev. Stat. § 19-4616(7) (1996) (municipal utilities); S.C. Code Ann. § 58-5-240 (E) (Law. Co-op. 1995); Tex. Corps. & Ass'ns Code Ann. §§ 2.212(d), 3.211 (d), 5.08(d) (West 1995); Utah Code Ann. § 54-7-12 (3)(c) (1996); Vt. Stat. Ann. tit. 30, § 227(a) (1996); Wis. Stat. § 196.19(d) (1994).

case.[25] Thus, on the one hand, several state utility regulators could be affected by the Court's decision.

On the other hand, the majority of states have enacted legislation that grants the utility protection against unreasonably protracted rate hearings without offending due process. States accomplish this end with a variety of statutes. Some states emulate the federal statutes applicable to FERC by providing that the regulator may suspend a requested change for a fixed period after which the change will be effective subject to refund during the pendency of the case. These statutes do not provide for automatic approval and do not specifically provide, but clearly imply, that proceedings will continue during suspension.[26] Most states permit the regulator to suspend a rate change for a fixed period. At the end of the suspension period, the new rates are effective subject to refund and explicitly subject to final decision.[27] Many of these statutes even require the posting of a bond or other security for the payment of refunds.[28]

---

[25] Ala. Code § 37-1-81(B) (1996); Fla. Stat. ch. 366.06(3); 367.081(8) (1996); Idaho Code § 61-622 (1996); Me. Rev. Stat. Ann. tit. 35-A, § 310 (2) (West 1995).

[26] Cal. Pub. Util. Code § 455 (Deering 1996); Colo. Rev. Stat. § 40-6-111(1)(b) (1996).

[27] Montana-Dakota Util. Co. v. Public Serv. Comm'n, 102 N.W.2d 329 (N.D. 1960); see W. Va. Code § 22-2-4a (1996) (specifically providing for a decision on the merits after suspension, but making interim rates not subject to refund).

[28] Ariz. Rev. Stat. Ann. § 40-256 (1996); Ark. Code Ann. § 23-4-411 (Michie 1995); Conn. Gen. Stat. Ann. § 16-19(b) (1994); Ind. Code Ann. §§ 8-2.1-22-20(b)(c); 8-2.1-22-25(b)(c) (Burns 1996); Ky. Rev. Stat. Ann. § 278.190(2) (Michie/Bobbs-Merrill 1995); La. Rev. Stat. Ann.

Among the states that grant utilities the prompt decisions they need to conduct business, several employ unique methods to provide that assurance. Various regulators are empowered to extend the suspension periods in their own discretion or for good reason[29], to extend the suspension period so that any party may fully prepare[30], or to extend the suspension period by applying for an extension to a designated state court.[31] Some states require that the regulator act expeditiously to ensure due process and to report to the state legislature or other officials if a decision is not rendered within a limited period.[32] Some states require that the regulator give suspended rate proceedings precedence over other matters.[33]

---

§ 45:1163.1(B)(C) (West 1996); Md. Code Ann. art. 78, §§ 54F(c); 70(b)(c) (1995); Miss. Code Ann. § 77-3-39(10) (1995); Mo. Ann. Stat. §§ 387.200, 393.150 (Vernon 1996); Mont. Code Ann. § 69-3-302(2) (1995); N.M. Stat. Ann. § 62-8-7(c) (Michie 1996); N.Y. Pub. Serv. Law § 66 (12) (McKinney 1996); N.D. Cent. Code § 49-05-06 (1995); Ohio Rev. Code Ann. § 4909.27 (Anderson 1995); Okla. Stat. tit. 17, § 152(B) (Supp. 1996); Or. Rev. Stat. § 757.215 (1995); 66 Pa. Cons. Stat. Ann. §§ 1308 (b), 1309 (b) (1995); S.D. Codified Laws Ann. §§ 49-34A-14, 49-34A-17 (1995); Tenn. Code Ann. § 65-5-203(b) (1995); Va. Code Ann. §§ 56-240, 56-265.13:6 (A) (Michie 1996); Wash. Rev. Code § 80.04.130 (1995).

[29] Alaska Stat. § 42.05.421(a) (1995); Haw. Rev. Stat. § 269-16(b) (1995); 66 Pa. Cons. Stat. Ann. § 1307 (f) (5) (1995).

[30] Iowa Code § 476.6(13) (1995).

[31] Ga. Code Ann. § 46-2-25(b) (1996).

[32] Hawaii Rev. Stat. § 269-16(a)(d); Mich. Comp. Laws § 460.6a (3) (1996) (Mich. Stat. Ann. § 22.13(6a)(3) (Callaghan 1996)).

[33] Ga. Code Ann. § 46-2-25(b); Mich Comp. Laws § 460.6a (3) (1996) (Mich. Stat. Ann. § 22.13(6a)(3) (Callaghan 1996)).

A review of the statutes enacted to address the due process rights of parties appearing before utility regulators yields several important conclusions. First and foremost, there are several states with regulatory schemes that could be interpreted as the Lower Courts interpreted the Kansas Statute. For these states, a decision by the Court in this case would act as valuable guidance concerning the constitutional implications of their regulatory framework. Furthermore, the statutes adopted by the other states vividly demonstrate that a utility's interests in prompt resolution of its rate requests can be preserved in a wide variety of ways that do not offend other parties' due process rights. The Court should grant this Petition and offer the states the constitutional guidance they need.

The need to provide constitutional guidance to the states is magnified by the current reality of utility regulation. It is clear that utility regulation is increasingly being moved to the states. An example from the natural gas industry is instructive. In its Order No. 636, FERC strongly encouraged interstate natural gas pipelines to divest their gas gathering operations.[34] As the pipelines have divested those assets, they have been assumed by entities no longer subject to federal regulation. The states, including Kansas, are considering the regulation of gathering to replace the regulation formerly offered by the federal government. As regulation moves to the states it is incumbent on the Court to ensure that the

---

[34] Pipeline Serv. Obligations and Revisions to Regulations Governing Self-Implementing Transportation; and Regulation of Natural Gas Pipelines After Wellhead Decontrol, 57 Fed. Reg. 13,267, III FERC Stats. & Regs. Preambles ¶ 30,939, order on reh'g, 57 Fed. Reg. 36,128, III FERC Stats. & Regs. Preambles ¶ 30,950, order on reh'g, 57 Fed. Reg. 57,911, 61 FERC ¶ 61,272 (1992).

constitutional protections will be observed by the states. Anything less leaves many consumers without the most fundamental protections required by the Constitution.

This case presents an important question of federal constitutional law. The Court's decision will have important national impact. The Court should grant this Petition and determine that the Statute as applied by the Lower Courts is unconstitutional.

CONCLUSION

The Court should grant WNG's Petition and find that the Statute, as applied by the courts of Kansas, violates the United States Constitution. This is a case of first impression that considers a significant issue of federal constitutional law which is important to utility ratepayers throughout the country. The Lower Courts' rulings deprived WNG of its constitutional right to notice and an opportunity to be heard and must therefor be reversed.

Respectfully submitted,

Gary W. Boyle
Counsel of Record

Jay V. Allen
The Williams Companies, Inc.
4100 One Williams Center
Tulsa, Oklahoma 74172
(918) 588-2359

Attorneys for Petitioner
Williams Natural Gas Company

November 19, 1996

Supreme Court, U.S.
FILED

(2) 96 778 NOV 19 1996

OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

WILLIAMS NATURAL GAS COMPANY,
Petitioner,

v.

KANSAS PIPELINE PARTNERSHIP,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of Kansas

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

GARY W. BOYLE
COUNSEL OF RECORD
THE WILLIAMS COMPANIES, INC.
4100 ONE WILLIAMS CENTER
TULSA, OKLAHOMA 74172
(918) 588-2359

JAY V. ALLEN
THE WILLIAMS COMPANIES, INC.
4100 ONE WILLIAMS CENTER
TULSA, OKLAHOMA 74172

83 pp

APPENDIX A

SUPREME COURT ORDER DISTRICT CASE NO.

IN THE SUPREME COURT

OF THE STATE OF KANSAS

DAVID P BATOW
WILLIAMS NATURAL GAS COMPANY
LEGAL DEPT 36TH FL
P O BOX 3288
TULSA OK 74101

KANSAS PIPELINE
PARTNERSHIP,
V
THE STATE CORPORATION
COMMISSION OF THE STATE
OF KANSAS,

PETITIONER,
No. 96-75918-AS

RESPONDENT.

YOU ARE HEREBY NOTIFIED OF THE FOLLOWING ACTION TAKEN BY THE COURT:

PETITION'S FOR REVIEW BY CURB, KCC & WILLIAMS NATURAL GAS.
CONSIDERED BY THE COURT AND DENIED.
RESPONSES NOTED.

KCC DOCKET NOS. 192,506-U AND 192,507-U

DATE: 09/09/96.

CAROL G. GREEN
CLERK

APPENDIX B

No. 75,918

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

KANSAS PIPELINE PARTNERSHIP,
Appellant,

v.

THE STATE CORPORATION COMMISSION OF THE STATE OF KANSAS,
Appellee.

SYLLABUS BY THE COURT

1. The Court of Appeals has exclusive jurisdiction to review any action of the Kansas Corporation Commission arising from a rate hearing. K.S.A. 1995 Supp. 66-118a(b).

2. The order under review in this case constitutes a final agency action subject to judicial review.

3. K.S.A. 77-607 and K.S.A. 77-608 are construed and applied.

4. K.S.A. 1995 Supp. 66-117 is construed and applied.

5. The scope of review of an agency action is set forth in K.S.A. 77-621, which codified principles long recognized by Kansas courts.

6. The cardinal rule of statutory construction is that the intent of the legislature governs if that intent can be ascertained.

intent of the legislature governs if that intent can be ascertained.

7. If a general and a specific statute both apply to a given situation, they should be read together and harmonized when possible.

8. The Kansas Corporation Commission's authority is limited to that conferred by statute.

9. A final order is one which terminates litigation on the merits and leaves nothing to be done except to enforce the result. In an agency setting, a final order needs to be more than a mere procedural ruling.

10. In an administrative setting, finality should be interpreted in a pragmatic way.

11. An agency's interpretation of a statute should be given deference, but when reviewing a question of law, an appellate court may substitute its judgment for that of the agency.

12. The legislature is presumed to understand the meaning of the words it uses and the procedures it establishes.

13. When a statute is clear and unambiguous, a court must give effect to the legislature's intent as expressed, rather than determine what the law should or should not be.

14. An amendment involves a change or modification and suggests an action by one of the parties to change, correct, or revise.

15. Ordinarily, a change in statutory language is presumed

to result from a legislative purpose to change its effect, but the presumption is of little force if an amendment is adopted as part of a general, technical revision to a statute.

16. Under the peculiar facts of this case, the relief sought by Kansas Pipeline Partnership was deemed approved by operation of law when the Kansas Corporation Commission failed to finally act within 240 days of the application and when neither of the exceptions of K.S.A. 1995 Supp. 66-117(b) applies.

Appeal from the Kansas Corporation Commission. Opinion filed May 17, 1996. Reversed.

James P. Zakoura, Richard W. Hird, and David J. Roberts, of Smithyman & Zakoura, Chartered, of Overland Park, and Fred J. Logan, Jr., of Logan & Logan, L.C., of Prairie Village, for appellant.

Larry M. Cowger, of Kansas Corporation Commission, for appellee.

Mark A. Burghart and W. Robert Alderson, of Alderson, Alderson & Montgomery, L.L.C., of Topeka, for intervenor Citizens' Utility Ratepayer Board.

John C. Frieden and Kevin M. Fowler, of Frieden, Haynes & Forbes, of Topeka, and David P. Batow and Gary W. Boyle, of Williams Natural Gas Company, of Tulsa, Oklahoma, for intervenor Williams Natural Gas Company.

Before ELLIOTT, P.J., ROYSE and KNUDSON, JJ.

ELLIOTT, J.: Kansas Pipeline Partnership (KPP) and

Western Resources, Inc., (WRI) entered into natural gas sales and transportation contracts. KPP submitted the contracts to the Kansas Corporation Commission (KCC) for approval pursuant to K.S.A. 1995 Supp. 66-117(a). WRI also requested KCC approval of the contracts and requested permission to pass contract costs through to its customers. Complicating matters, the KCC shifted a $ 5.9 million Linchpin Development cost item from another rate hearing into this KPP application. The other rate hearing is currently pending in this court as appeal No. 75,730.

On judicial review, KPP asserts that because the KCC failed to make a decision on these contracts and the development cost item within time limits established by KCC regulations and K.S.A. 1995 Supp. 66-117(b), the contracts and other requested relief became "deemed approved" by operation of law. This is the ultimate question for us to decide on the merits of this appeal.

We agree with KPP and reverse.

A brief description of the major participants is as follows:

KPP is a natural gas public utility and the applicant before the KCC.

The KCC is the state regulatory agency with the power and authority to supervise and control intrastate natural gas public utilities doing business in Kansas. See K.S.A. 66-101 et seq.

WRI is a class A natural gas public utility, authorized to deliver natural gas to customers in Kansas, and was the other signatory to the KPP contracts for which approval was sought.

WRI also sought approval of the contracts, but has not appealed the matter to this court.

Williams Natural Gas Company (WNG) is also a natural gas public utility and is a marketplace competitor of KPP.

The Citizens' Utility Ratepayer Board (CURB) is a state agency created to look out for the interests of individuals and small businesses in regulating public utilities.

The Federal Energy Regulatory Commission (FERC) is a federal agency regulating interstate pipelines which are within its exclusive jurisdiction.

The five contracts may be summarized thus: The contracts between KPP and WRI call for the sale and transportation of increased volumes of natural gas for delivery in Johnson, Wyandotte, Franklin, and Miami Counties in Kansas. Two of the three gas purchase contracts require KPP to deliver natural gas to the city gates at Ottawa, Paola, and Osawatomie for a term of 20 years. The third gas purchase contract calls for KPP to transport and sell natural gas to delivery points in Johnson and Wyandotte Counties for a term of 10 years.

The two transportation contracts call for the construction of a 24-mile pipeline spur to connect the Panhandle Eastern Pipeline Company's facilities to those of WRI (the "Metcalf Contract"), and for KPP to provide natural gas to WRI for Johnson and Wyandotte Counties commencing in the year 2009 (the "2009 Contract").

Jurisdiction

Without detailing the various dates on which various pleadings were filed, we have determined the jurisdictional filings by KPP are timely.

We have exclusive jurisdiction to review any action of the KCC arising from a rate hearing. K.S.A. 1995 Supp. 66-118a(b). In KPP's original filing, it did not request a rate increase, but WRI did. The WRI docket was consolidated with the KPP filing. Additionally, the joinder of the Linchpin Project Development costs into this proceeding made it an action intimately related to a prior rate case. See MAPCO Intrastate Pipeline Co. v. Kansas Corporation Comm'n, 10 Kan. App. 2d 527, 530-31, 704 P.2d 989 (1985); In re Application of Southwestern Bell Tel. Co., 9 Kan. App. 2d 525, 529, 685 P.2d 304, rev. denied 236 Kan. 875 (1984).

The parties seem to agree that this case is closely enough connected to an underlying rate case to give us jurisdiction.

While we have determined we have jurisdiction under K.S.A. 1995 Supp. 66-118a(b), a question still remains whether the KCC order of November 22, 1995, is reviewable.

By applying the relevant considerations of Southwestern Bell, the KCC order is a final agency action entitling KPP to judicial review. The KCC's denial of KPP's arguments that the contracts were "deemed approved" due to the expiration of time is a final decision on this issue. It has a direct effect on KPP and presents a legal question for our review. Further, ruling on this issue does not disrupt the orderly process of adjudication in the administrative proceeding. The November 22, 1995, KCC order is final agency action subject to review.

In Southwestern Bell, we did not clearly state whether we were considering a final agency decision or a nonfinal agency decision ripe for interlocutory review. Either way, we have jurisdiction to consider KPP's appeal. See K.S.A. 77-607(b), K.S.A. 77-608.

Merits

In orders mailed April 21 and 24, 1995, the KCC suspended the effective dates of the contracts for 180 days of their filing on March 31, 1995; the WRI rate request and the KPP contract dockets were consolidated. After numerous continuances, hearings were finally conducted between August 21, 1995, and September 6, 1995. At the close of the hearings, the KCC closed the record, ordered briefs filed by October 6, 1995, and took the dockets under advisement.

After briefs were filed but before the KCC issued a decision, FERC issued a draft order stating it had jurisdiction over KPP as an interstate pipeline. When FERC asserts jurisdiction, any state regulatory agency loses jurisdiction. As a result, the KCC staff on November 1, 1995, requested a stay pending a final order from FERC. KPP opposed the stay. The KCC issued a stay on November 3, 1995, and on November 22, 1995, issued an order superseding the earlier order, in which it found:

(1) Expiration of the initial 180-day time period set by the KCC did not cause the contracts to be deemed approved because that order was subject to further KCC orders and KPP did not object to the closing of the record as of October 6, 1995 (beyond the 180-day period);

(2) The KCC order of November 3, 1995, which was within the 240-day limitation of K.S.A. 1995 Supp. 66-117(b) was "probably a sufficient adjudication within the 240-day period of time";

(3) The KCC restarted the 240-day clock called for by K.S.A. 1995 Supp. 66-117(b) because the FERC finding of jurisdiction over KPP was a "substantial alteration of the facts" forming the basis for the KPP request; and

(4) "a continued stay at this juncture serves the public interest especially in light of the unbundling concerns raised by staff should FERC ultimately find it has jurisdiction" over KPP.

On December 8, 1995, several things occurred:

(1) FERC stayed its assertion of jurisdiction over KPP and clarified that KCC orders regarding KPP will remain in effect until FERC made its final rulings in the case.

(2) The KCC denied KPP's request to reconsider its November 3, 1995, order because it was superseded by the KCC order of November 22, 1995.

(3) KPP requested reconsideration of the November 22 KCC order, which was denied on December 28, 1995.

(4) FERC issued an order clarifying a prior order. In this order, FERC stayed its assertion of jurisdiction over KPP until 60 days after an order on the merits of petitions for rehearing. FERC also ruled that, meanwhile, KPP could continue to provide services,

collect rates on file with the KCC, and "undertake all other activities authorized by [FERC] and the KCC." (Emphasis added.)

On appeal, our scope of review is set forth in K.S.A. 77-621, which codified principles repeatedly recognized by Kansas courts. See, e.g., Kansas Gas & Elec. Co. v. Kansas Corporation Comm'n, 239 Kan. 483, 497-98, 720 P.2d 1063 (1986); Midwest Gas Users Ass'n v. Kansas Corporation Commission, 3 Kan. App. 2d 376, 380-81, 595 P.2d 735, rev. denied 226 Kan. 792 (1979).

Further, we recognize that the cardinal rule of statutory construction is that the intent of the legislature governs if that intent can be ascertained. City of Wichita v. 200 South Broadway, 253 Kan. 434, 436, 855 P.2d 956 (1993).

As indicated earlier, at the close of the technical hearings, the KCC ordered the filing of briefs by October 6, 1995. KPP did not object to the October 6 date, although it was beyond the 180 days mentioned in the original suspension orders which expired on September 27, 1995. Accordingly, we shall concentrate our evaluation of this appeal on the 240-day limitation contained in K.S.A. 1995 Supp. 66-117(b).

The KCC has never suggested this case is not controlled by K.S.A. 1995 Supp. 66-117(b). Although the statute does not specifically list "gas purchase contracts" or "gas service agreements," clearly these would fall within "practice pertaining to the service or rates of such public utility." See K.S.A. 1995 Supp. 66-117(a).

CURB argues this case is governed by K.S.A. 1995 Supp. 66-1,203, which specifically applies to natural gas public

utilities. Pursuant to that statute, every natural gas public utility regulated by the KCC must furnish the KCC with copies of all contracts between natural gas public utilities and all jurisdictional services to be rendered by the utility. WNG also urged this position during oral arguments. This statute applies specifically to natural gas public utilities regulated by the KCC, while K.S.A. 1995 Supp. 66-117(b) merely applies to all public utilities regulated by the KCC.

If a general and a specific statute both apply to a given situation, they should be read together and harmonized when possible. See Kansas Racing Management, Inc. v. Kansas Racing Comm'n, 244 Kan. 343, 353, 770 P.2d 423 (1989). The provisions of these two statutes can be read consistently.

K.S.A. 1995 Supp. 66-117(b) applies when any public utility is requesting a change in its rates or services that will have an impact on its customers. On the other hand, 66-1,203 requires a natural gas public utility to file copies of its rates and contracts, even if no changes are requested. Although the statutes overlap to some extent, they are not inconsistent and both are applicable.

At last, we reach the core question for our determination: Is KPP's request for relief "deemed approved" by the KCC's failure to issue a final order on the proposed changes within the 240-day period mandated by K.S.A. 1995 Supp. 66-117(b)? We answer in the affirmative.

Preliminarily, at oral argument, the KCC acknowledged that 66-117 is the only statute permitting suspension of an effective date, and CURB candidly, but reluctantly, agreed that 66-117 controls this appeal.

No one contests that the KCC's authority is limited to that conferred by statute. Cities Service Gas Co. v. State Corporation Commission, 197 Kan. 338, 342, 416 P.2d 736 (1966); Kansas-Nebraska Natural Gas Co. v. Kansas Corporation Commission, 4 Kan. App. 2d 674, 675, 610 P.2d 121, rev. denied 228 Kan. 806 (1980). We must determine what now happens when the KCC fails to exercise the power conferred on it by statute.

K.S.A. 1995 Supp. 66-117(b) specifically provides that the KCC shall not delay the effective date of a proposed change in rate or many practice pertaining to service for more than 240 days beyond the date the utility filed its application with the KCC.

The statute further provides that if the KCC has not issued a final order within those 240 days, then "the schedule shall be deemed approved by the commission and the proposed change shall be effective immediately, except that (1) ... any amendment to an application . . . which increases the amount sought by the public utility . . . or substantially alters the facts used as a basis for requested change . . . shall, at the option of the commission, be deemed a new application and the 240-day period shall begin again from the date of the filing of the amendment, and (2) if hearings are in process before the commission . . . on the last day of such 240-day period, such period shall be extended to the end of such hearings plus 20 days to allow the commission to prepare and issue its final order." K.S.A. 1995 Supp. 66-117(b) (Emphasis added.)

No one contends the hearing was "in process before the commission" on the 240th day. The KCC closed the record and took the matter under advisement prior to expiration of the 240-day period. The question is whether either of the KCC

orders of November 3 and 22, 1995, was a "final order" for purposes of 66-117(b). If so, both were entered within the 240-day clock. If not, we must decide whether the KCC acted properly in restarting the 240-day clock. We note that the KCC closed the record in these consolidated dockets at the conclusion of hearings on September 6, 1995. So far as we can determine, the KCC never reopened the record in these consolidated dockets. See K.A.R. 82-1-230(k), (l).

KPP filed its request for approval of the five contracts on March 31, 1995; the 240th day thereafter would be November 29, 1995. On November 2, FERC issued a draft order asserting jurisdiction over KPP, and on November 3 the KCC, sua sponte, determined the dockets should be stayed.

Then on November 22, 1995, the KCC issued another order affirming its order of November 3 and ordering these dockets be stayed until FERC took final, appealable action. This order also purported to restart the 240-day clock ("to the extent, if any, that it applies") as of November 2, 1995. The KCC also stated its November 22 order superseded its November 3 order.

"Final order" has been defined as one which terminates the litigation on the merits and leaves nothing to be done except to enforce the result. Black's Law Dictionary 630 (6th ed. 1990). In an administrative setting, a final order needs to be more than a mere procedural ruling, and "finality" should be interpreted in a pragmatic way. Southwestern Bell Tel. Co. v. Kansas Corporation Commission, 6 Kan. App. 2d 444, 452-53, 629 P.2d 1174, rev. denied 230 Kan. 819 (1981). See Oilfield Fluid Motor Carriers v. Kansas Corporation Comm'n, 234 Kan. 983, 988, 677 P.2d 982 (1984).

In the present case, the KCC orders enter a stay pending a decision by FERC. A "stay" is a suspension of a case. Black's Law Dictionary 1413 (6th ed. 1990). By entering a stay, the KCC did not issue a final order in the proceeding.

Accordingly, this case presents a good example of when a KCC order can be final agency action under 77-607(b)(1), but not a final order under 66-117(b). The KCC's decision rejecting KPP's argument the contracts should be deemed approved (66-117[b]) is a final ruling on that statutory interpretation question. Nothing is unresolved, rendering it a final agency action under 77-607(b)(1). On the other hand, since the KCC has made no ruling regarding whether KPP's contracts should be approved, it has not entered a final order on the proposed changes under 66-117(b).

As WNG argues, both times the "deemed approved" language appears in the statutes, the phrase refers to a "schedule." "Schedule" is not defined in any statute or any KCC regulation which we have been able to discover, and the parties have not referred us to any such definition. The general definition of "schedule" would cover almost any filing, and pragmatically, we conclude the KPP contracts and other documents appended to its application meet the requirement of a schedule. See K.A.R. 82-1-231; Black's Law Dictionary 1344 (6th ed. 1990).

The KPP contracts would change the practices pertaining to services made available by KPP for WRI's customers. Accordingly, the changes set forth in the contracts fall under the provisions of 66-117(b) requiring KPP to request approval of the changes.

Before leaving this aspect of the case, we need to

discuss the legislative history for 66-117. Dramatic changes were made to KCC procedures in 1980 by the enactment of S.B. 881. L. 1980, ch. 200. Minutes of hearings before the House Ways and Means Committee on the bill make clear the legislature was aware it was making significant changes. Minutes to a hearing on April 8, 1980, report that Senator Frank Gaines supported the bill which would permit a utility to automatically get the increase sought when the KCC did not act within a certain time frame. See House Ways and Means Committee, 1980 Session, Minutes of April 8, 1980, p. 1. Throughout the debate on S.B. 881, the KCC was given only 180 days to decide a case, but the final bill changed this to 240 days.

Most of the testimony before the Ways and Means Committee uses the term "utility rate cases" in discussing the bill, but the term is never defined. Further, "schedule" is not mentioned, except in a proposed draft of the bill. A main proponent of the bill was Southwestern Bell Telephone Company (SWB), which argued time limits were not new and had been adopted by numerous regulatory agencies across the country. Testimony of Bill Ewing (SWB), Attached to Minutes of House Ways & Means Committee, April 8, 1980.

Opposing S.B. 881 was Pete Loux, then chair of the KCC. He argued the states which had adopted time limits had much larger staffs or were responsible for regulating fewer companies. Chairman Loux also presented a staff position paper authored by Brian Moline, then general counsel of the KCC. Moline expressed concern that the language of S.B. 881 was very broad and cautioned that the bill "changes long established public policy of Kansas." KCC Staff Position on S.B. 881, Attached to Minutes of House Ways & Means Committee, April 8, 1980, at 4.

Our review of the legislative history convinces us the purpose of S.B. 881 was to adopt time limits to remedy delays utilities had experienced with the KCC. Nothing in the legislative history suggests the legislature intended to distinguish between "pure" rate cases and hybrid cases that could be considered "arising from a rate hearing" and thus appropriate for exclusive review by this court.

While S.B. 881 does not refer specifically to 66-118a, giving us exclusive jurisdiction over appeals arising from a rate hearing, the bill did amend 66-118g, setting the time limits in which we must decide such cases.

Nothing we have discovered suggests the time limits covered by S.B. 881 were intended to be different for rate cases under 66-117 as opposed to cases arising from a rate hearing pursuant to 66-118g. If a case arises from a rate hearing for purposes of 66-118g, legislative history suggests the time limits of 66-117(b) would also apply.

No one really contests that this case is one arising from a rate hearing. Under the express language of 66-117(b), the schedules/contracts are deemed approved and the proposed changes take effect immediately unless a final order is issued by the KCC within 240 days of KPP's application, or unless one of the exceptions applies.

Here, no final order was issued. As a result, our final question is whether the KCC had the statutory power and authority to restart the 240-day clock under the peculiar facts of this case.

K.S.A. 1995 Supp 66-117(b) provides that after 240 days, the schedule is deemed approved except where an

amendment to an application seeks an increase in the amount sought or substantially changes the facts used as a basis for the requested change.

The KCC interprets the statute broadly to include any change of the facts, regardless of whether an amendment to the application has been filed. We are unable to agree with the KCC's interpretation.

Here, none of the parties filed any amendment to the application for proposed change that increased the amount sought by the KPP. Thus, the only way this proceeding could be extended is if the KCC were correct in finding (1) that FERC's preliminary assertion of jurisdiction substantially altered the facts used as a basis for the requested change and (2) that this gave the KCC the option to deem a new application had been filed.

The KCC does not directly address the problem created by the failure of anyone to file an amendment to the application. CURB does not address the need for an amendment either; rather, it argues the KCC was in substantial compliance with the statutory mandate when it restarted the 240-day clock. WNG asserts that 66-117(b) simply does not apply. As previously held, the legislature did not distinguish between types of rate hearings in enacting S.B. 881. The legislature intended the time limits to apply to all hearings requesting a change, including those arising from a rate hearing.

KCC regulations provide for specific procedures to follow when a public utility wants to revise or amend its application or schedules. See K.A.R. 82-1-231(d). Further, Chairman Loux, in his letter to Mike Hayden, then chair of the

House Ways and Means Committee, specifically voiced his concern whether an amendment by an applicant would restart the time clock. Loux Memo dated April 8, 1980, attached to House Ways and Means Committee Minutes.

FERC issued its initial order on November 2, 1995. Yet in its order of November 22, the KCC recognized it had continuing jurisdiction over KPP. FERC then stayed its earlier order and clarified that KPP was allowed to undertake all activities authorized by the KCC. The KCC did not issue its order denying KPP's petition to reconsider until December 28, 1995.

The KCC argues that the FERC order asserting jurisdiction over KPP was a substantial alteration of the facts. An agency's interpretation of a statute should be given deference, but when reviewing a question of law, we may substitute our judgment for that of the agency. See Hickey v. Kansas Corporation Comm'n, 244 Kan. 71, 76, 765 P.2d 1108 (1988).

We note that the KCC was aware as early as June 2, 1995, that FERC was considering asserting jurisdiction over KPP. Since the parties were aware of FERC's interest in KPP for 5 months, we are unable to understand how FERC's order of November 2, 1995, is a substantial alteration of the facts used as a basis for the requested approval of contracts. The facts supporting the proposed changes remained the same although the status of the parties may well have been altered.

Simply put, the punctuation of the statute in light of the legislative history precludes the KCC's interpretation of 66-117(b).

The legislature is presumed to understand the meaning of the words it uses and procedures it establishes. State Bank Commissioner v. Emery, 19 Kan. App. 2d 1063, 1071, 880 P.2d 783 (1994). And when a statute is clear and unambiguous, we must give effect to the legislature's intent as expressed, rather than determine what the law should or should not be. Martindale v. Tenny, 250 Kan. 621, Syl. P 2, 829 P.2d 561 (1992).

Finally, we must decide whether the statutory phrase "substantially alters the facts used as a basis for such requested change of rate" modifies "any amendment" or whether it applies to any change regardless of origin. Grammatically, we have no hesitancy in holding "amendment" is the controlling noun which is the subject of the modifying phrase.

An amendment makes a change or modification. Black's Law Dictionary 81 (6th ed. 1990). It suggests an action by one of the parties to change, correct, or revise. No action was taken by KPP, WRI, or the KCC to change or modify the application which would trigger the provisions of 66-117(b).

Further review of the legislative history concerning the evolution of this provision supports our conclusion that an amendment is required.

The phrase "which amendment" contained in the original 1980 legislation, was deleted in 1988, as part of legislation that broadened application of the administrative procedures act. The legislation changed all time limits from being written out, to numerals (i.e., two hundred forty, to 240). See L. 1988, ch. 356, at 225.

When the phrase under scrutiny is read to include

"which amendment" the original intent of the legislature is clearer. The 1988 changes were the result of S.B. 334, which made some substantive changes to the administrative procedures act, but overall appears to be a technical bill to "clean up" the statutes by converting to numerals.

Ordinarily, a change in statutory language is presumed to result from a legislative purpose to change its effect. Schuhs v. Schuhs, 20 Kan. App. 2d 98, 99, 883 P.2d 1225 (1994). But this presumption is of little force if an amendment is adopted as part of a general, technical revision to a statute. Board of Education U.S.D. 512 v. Vic Regnier Builders, Inc., 231 Kan. 731, 736, 648 P.2d 1143 (1982).

We do not view the deletion of the phrase "which amendment" by the legislature in 1988 as a substantive change intended to modify the meaning of 66-117(b). Rather, the change was merely part of a larger bill seeking to bring consistency to statutes under the administrative procedures act.

At the time the original provisions imposing time limits on the KCC were adopted, the House Ways and Means Committee rejected without discussion a suggestion that would have given the KCC more flexibility in deciding cases under the new time limits. House Ways and Means Committee Minutes, May 2, 1980, p. 2.

Thus, the legislature was intent on forcing the KCC to act within prescribed time limits; if it does not, the proposed changes take effect. In 1980, the legislature recognized the increased burden the time limits would place on KCC staff. Senator Frank Gaines assured members of the House that adequate funds would be provided for the KCC "to adequately and efficiently carry out the provisions of this act" and further

"gave his personal assurance that funds would be provided." House Ways and Means Committee Meeting, May 2, 1980, p. 1.

CURB asks us not to abandon or ignore the "thousands" of hours of staff work and the "hundreds of thousands of dollars" of legal and technical analysis expended on the five contracts submitted for approval. But legislative history makes clear that was precisely an anticipated result should the KCC fail to make a final decision within the time limits provided by K.S.A. 1995 Supp. 66-117(b).

The contracts and related requests contained in KPP's consolidated KCC dockets must be deemed approved by operation of law.

Reversed.

APPENDIX C

THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS

Before Commissioners: Susan M. Seltsam, Chair
F. S. Jack Alexander
Timothy E. McKee

In the Matter of the Filing of Kansas Pipeline Partnership for approval and to make effective certain firm gas purchase contracts between Kansas Pipeline Partnership and Western Resources, Inc.	)	Docket No. 192,506-U
In the Matter of the Application of Western Resources for an order approving certain contracts with Kansas Pipeline Partnership, and authorizing inclusion of costs related to such contract in Western Resources' purchased gas adjustment clause for recovery from its customers.	)	Docket No. 192,391-U
In the Matter of the Filing of Kansas Pipeline for approval and to make effective certain gas transportation service agreements between Kansas Pipeline Partnership and Western Resources, Inc.	)	Docket No. 192,507-U

ENTERED
NOV 3 1995

ORDER

On October 25, 1995, the Federal Energy Regulatory Commission (FERC) decided during their administrative meeting that KansOk Partnership (KansOk), Kansas Pipeline

Partnership (Kansas Pipeline) and Riverside Pipeline Company, L.P. (Riverside) constituted an interstate pipeline subject to FERC's jurisdiction. In response to FERC's action and draft order, the Kansas Corporation Commission Staff (Staff) filed a Motion for Stay of Proceedings on November, 1995.

Pursuant to K.S.A. 77-526(g), the Kansas Corporation Commission (Commission) must issue an order within 30 (thirty) days after the conclusion of the hearing or submission of findings. In this case, parties submitted their findings of fact and conclusions of law on October 6, 1995. Accordingly, the Commission has through November 6, 1995, in which to issue an order or extend the period of time in which to issue a final order for good cause shown.

The Commission notes that on November 2, 1995, FERC issued an initial order and Kansas Pipeline et al. was ordered to file an application for certificate authorization. The Commission, on its own motion, has determined that a stay of the above referenced dockets is appropriate until all parties have had an opportunity to respond to the Motion for Stay of Proceedings filed by Staff and until such time as the period for rehearing before FERC has passed and final appealable action has been taken.

IT IS, THEREFORE, BY THE COMMISSION ORDERED:

1. The above-referenced dockets are stayed pending further order of this Commission.

2. All parties may file a response to Staff's Motion for Stay of Proceedings on or before November 14, 1995.

A party may file a petition for reconsideration of this order within fifteen (15) days from the date of this order. If service is by mail, three (3) additional days may be added to the fifteen (15) day time limit to petition for reconsideration.

The Commission retains jurisdiction over the subject matter and the parties for the purpose of entering such further order or orders as it may deem necessary.

BY THE COMMISSION IT IS SO ORDERED.

Seltsam, Chr.; Alexander, Com.; McKee, Com.

Dated: November 3, 1995

[ORDER MAILED]
[NOV 3 1995]
[JUDITH MCCONNELL]
[EXECUTIVE DIRECTOR]

/s/
Judith McConnell
Executive Director

APPENDIX D

THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS

Before Commissioners: Susan M. Seltsam, Chair
F. S. Jack Alexander
Timothy E. McKee

In the Matter of the Filing of Kansas Pipeline Partnership for approval and to make effective certain firm gas purchase contracts between Kansas Pipeline Partnership and Western Resources, Inc.	)	Docket No. 192,506-U
In the Matter of the Application of Western Resources for an order approving certain contracts with Kansas Pipeline Partnership, and authorizing inclusion of costs related to such contract in Western Resources' purchased gas adjustment clause for recovery from its customers.	)	Docket No. 192,391-U
In the Matter of the Filing of Kansas Pipeline for approval and to make effective certain gas transportation service agreements between Kansas Pipeline Partnership and Western Resources, Inc.	)	Docket No. 192,507-U

ENTERED
NOV 22 1995

ORDER

This matter is before the Kansas Corporation Commission (Commission) on the Motion of Commission Staff (Staff) for Stay of Proceedings. On November 1, 1995, Staff requested a stay of proceedings "pending a final order in Federal Energy Regulatory Commission (FERC) Docket Nos. RP95-212-000 and RP95-395-000." (Staff's motion, p. 1). Staff based its request for stay on FERC's ruling on October 25, 1995, and Draft Order which provides that "the natural gas transmission systems of KansOk Partnership, KPP and Riverside Pipeline Company, L.P. (collectively referred to as Kansas Pipeline) constitute an interstate natural gas pipeline system subject to FERC jurisdiction under the Natural Gas Act." (Staff's motion, p.2). Staff argued that the Commission, after FERC's ruling and issuance of a Section 7 Certificate to Kansas Pipeline, would not have jurisdiction. Staff believes further action would constitute "a wasteful and inefficient use of the Commission's resources and would be unnecessary under the present circumstances." (Staff's motion, p.3).

On November 2, 1995, FERC issued an official order memorializing the action taken on October 25, 1995. On November 3, 1995, the Commission stayed the above-captioned cases pending an opportunity for all parties to respond to Staff's Motion for Stay of Proceedings and until such time as the period for rehearing has passed before FERC and final appealable action has been taken.

For purposes of Staff's motion and the responses filed thereto, Staff appeared by Larry Cowger; Kansas Pipeline Partnership (Kansas Pipeline) appeared by James P. Zakoura and Richard W. Hird; Western Resources, Inc. (Western Resources) appeared by J. Michael Peters; Williams Natural

Gas Company (WNG) appeared by John C. Frieden and Kevin M. Fowler; and the Cities of Ottawa and Paola, Kansas, appeared by Robert L. Bezek, Jr.

Kansas Pipeline argues the process outlined by FERC in its November 2, 1995 Order -- "an application for certificate, approval of terms and conditions of service, approval of rates, and transitioning existing operations to be in compliance with FERC Order No. 636 -- could extend well over a year, and perhaps more." (Kansas Pipeline's response, p.3). Kansas Pipeline is seeking a stay of FERC's November 2, 1995 Order and also intends to seek rehearing of that Order.

Kansas Pipeline argues the Commission is without power to stay this action. Specifically, Kansas Pipeline references the Commission's April 21, 1995 Orders in Docket Nos. 192,506-U and 192,507-U which granted a 180-day suspension period from the date the applications were filed on March 31, 1995. Kansas Pipeline argues the suspension period expired on September 27, 1995. Since there were no further suspensions issued, Kansas Pipeline contends the contracts in Docket Nos. 192,506-U and 192,507-U became effective on September 27, 1995. (Kansas Pipeline's response p. 5).

Moreover, Kansas Pipeline contends even if FERC arguably assumed jurisdiction on November 2, 1995, the suspension period expired prior to FERC's order. In the alternative, Kansas Pipeline argues that the Commission must issue an order within 240 days, no later than November 29, 1995, or the contracts are deemed approved. K.S.A. 66-117. (Kansas Pipeline's response, p.6)

Kansas Pipeline believes Staff's request for a stay is "unusual, extraordinary and inappropriate." (Kansas Pipeline's

response, p.6). Only WNG, according to Kansas Pipeline, will benefit from a stay and "the contracts may become null and void simply by the passage of time...." (Kansas Pipeline's response, p.7).

Kansas Pipeline maintains the Commission continues to have jurisdiction. If the Commission were not to regulate Kansas Pipeline, prior to the issuance of a FERC certificate, Kansas Pipeline would be in "jurisdictional limbo." (Kansas Pipeline's response, p.8). Further, Kansas Pipeline intends to pursue all available avenues of appeal regarding FERC's November 2, 1995 Order. Staff's motion, according to Kansas Pipeline, would place it in "regulatory limbo for an indeterminate amount of time" and would constitute an unconstitutional taking without compensation if it could not charge "fair, just and reasonable rates." (Kansas Pipeline's response, p.10). Kansas Pipeline believes a Commission decision would be beneficial to the FERC and approval of the applications would benefit consumers. (Response, pp.10-12).

Western Resources' response calls attention to the "commercial transactions for which time is important." (Western Resources' response, p.3). Western Resources also believes the Commission "must reconcile its intended stay of these proceedings in light of its April 20, 1995 Suspension Order...." (Western Resources' response, p.3). And finally, Western Resources requests the Commission to rule "expeditiously." (Western Resources' response, p.3).

WNG seeks reconsideration of the Commission's June 22, 1995 Order [denial of WNG's motion for denial of stay] and July 26, 1995 Order [denial of WNG's motion to dismiss for lack of subject matter jurisdiction] based on the "materially changed circumstances" and requests that all pending

applications be dismissed without prejudice until such time as FERC determines it "does not have jurisdiction over Kansas Pipeline Partnership under the Natural Gas Act." (WNG's response, p.2) WNG concurs with Staff's basis for a stay, but believes dismissal of the pending applications on jurisdictional grounds to be more appropriate. (WNG's response, p.2)

WNG has argued that these proceedings are subject to K.S.A. 66-117 and K.A.R. 82-1-231 but contends "it is unclear whether the 240-day period prescribed in K.S.A. 66-117(b) is applicable." WNG believes the Commission's stay granted on November 3, 1995, "to determine whether the Commission has any continuing jurisdiction over the contracts and/or whether the decision by FERC is effectively an amendment or modification to the applications filed by joint applicants is likely a sufficient adjudication or otherwise fulfills the requirements under K.S.A. 66-117." (WNG's response, pp.3-4). Arguably, the contracts may be "deemed approved" pursuant to K.S.A. 66-117(b), notwithstanding the stay. WNG previously sought a stay from the Commission, pending final outcome at FERC, and also sought dismissal of these proceedings for lack of subject matter jurisdiction. WNG believes FERC's action on October 25, 1995, constitutes a material change in circumstances to warrant reconsideration of WNG's previous motion to dismiss.

Dismissing the action without prejudice would avoid any "possibility that the proposed contracts may be 'deemed approved' without Commission action after November 26, 1995." (WNG's response, p.5). While WNG "endorses... Staff's rationale for a stay" WNG seeks dismissal of the contracts for lack of subject matter jurisdiction. (WNG's response, p.5)

The Cities of Ottawa and Paola, Kansas (Ottawa and Paola) believe "no valid reason exists for the Commission to avoid deciding the above, to deny the approval of the five gas and transportation contracts filed by Kansas Pipeline and deny the pass-through of costs, resulting from the contracts to Western Resources." (Ottawa and Paola's response, pp.1-2). Ottawa and Paola stated that the two main issues, whether to approve the five gas contracts and whether to approve the pass-through, are briefed and ready for decision. In the event FERC removes jurisdiction from the Commission, Ottawa and Paola contend the Commission would still have jurisdiction to consider the pass-through issue. (Ottawa and Paola's response, p. 2). Ottawa and Paola believe "[t]he ability to acquire right of way, utility easements and the utility franchise itself is clouded by the lack of a decision regarding the gas and transportation contracts." Moreover, "regarding the approval and pass-through of these contract costs, there will always be a question as to whether the franchise can be condemned with or without the gas contracts." (Ottawa and Paola's response, pp. 2-3). Ottawa and Paola believe they will suffer harm if no decision is made. (Ottawa and Paola's response, p. 3).

In the event the Commission believes the FERC decision has the impact of removing jurisdiction, Ottawa and Paola recommend the Commission dismiss this proceeding without prejudice prior to the expiration of 240 days to avoid approval of these contracts and impose certain conditions. Those conditions would include the requirement that the refiled action be submitted on the record that exists and that a decision be rendered within a specified period of time, i.e., 60 (sixty) days. (Ottawa and Paola's response, pp. 3-4). And finally, if Kansas Pipeline and Western Resources make any modifications to these contracts, then the prior contracts should be deemed denied and the new contracts resubmitted with

notice to all parties and "without requiring agreement to confidentiality contracts." (Ottawa and Paola's response, p. 4).

Staff filed a reply to the responses to Staff's motion for stay. Staff set forth a brief procedural history of these consolidated dockets. On April 20, 1995, the Commission suspended for 180 days from the date of the applications, approval of these agreements "subject to further order or orders of the Commission." (Docket Nos. 192,506-U and 192,507-U). On April 27, 1995, the commission consolidated the above three dockets upon Western Resource's motion. The Commission set a procedural schedule by order dated May 10, 1995. Two subsequent orders modified the procedural schedule and ultimately an evidentiary hearing commenced on August 21, 1995. (Staff's reply, pp. 2-3). The evidentiary hearing ended September 6, 1995, and parties were ordered to file briefs and/or findings of fact and conclusions of law on or before October 6, 1995. Staff interprets these orders as superseding the prior suspension orders. While staff believes "the Commission's orders modifying the procedural order obviously extended the proceedings past the originally scheduled 180 days, it would have apparently been helpful to some parties had the Commission explicitly spelled out in an order the fact that by extending its procedural orders past September 27, 1995, the original suspension order had been modified." (Staff's reply, p. 3). Accordingly, Staff now requests the Commission to make this explicit finding at this time.

Staff contends the only arguable "operation of law" date to apply to these applications is contained in K.S.A. 66-117(b). The statute first "provides that if a utility files 'a schedule showing the changes to be made,' such proposed schedule shall be deemed approved if not suspended by the Commission within thirty (30) days of its filing." (Staff's reply, pp. 3-4).

Moreover, the statute requires that the effective date of the changes proposed may not be delayed beyond 240 days from the date of filing. Staff references other statutory authority:

> [T]he specific statute requiring the filing of contracts by natural gas utilities, K.S.A. 66-1,203, makes no mention of the 240-day requirement, nor does the statute authorizing a hearing on gas rates, K.S.A. 66-1,204." (Staff's reply, p. 4). In fact, case law discussing the Commission's duty to investigate the reasonableness of contracts filed by a public utility have indicated that such duty flows from general grant of power and authority contained in K.S.A. 66-101 (c.f. K.S.A. 66-1,201) which likewise does not reference any 240-day requirement. *Central Kansas Power Co. v. State Corp. Commission*, 316 P.2d 277, 181 Kan. 817 (1957).

(Staff's reply, p. 4). Staff stated that the expiration of the 240-day requirement, for argument purposes, would require a decision on the contracts by November 27, 1995.

Staff highlights an exception to the 240-day rule and argues its applicability here. K.S.A. 66-117(b)(1) provides:

> (1) for purposes of the foregoing provisions regarding the period of time within which the commission shall act on an application, any amendment to an application for a proposed change in any rate, which increases the amount sought by the public utility or common carrier or substantially alters the facts used as a basis

> for such requested change of rate, shall, at the option of the commission, be deemed a new application and the 240-day period shall begin again from the date of the filing of the amendment.

(Staff's reply, pp. 4-5 citing K.S.A. 66-117(b)(1)). Staff believes the Commission should exercise its discretion under this provision. Staff concurs with WNG's interpretation that the "Commission order to stay these proceedings to determine whether it has any continuing jurisdiction over the contracts and/or whether the decision by the Federal Energy Regulatory Commission (FERC) is effectively an amendment or modification to the application filed by joint applicants, is likely a sufficient adjudication or otherwise fulfills the requirements under K.S.A. 66-117." (Staff's reply, p. 5). Staff also interprets FERC's decision which subjects Kansas Pipeline's pipe gas transmission systems to federal jurisdiction "is a matter which 'substantially alters the facts used as a basis for such requested change . . .' K.S.A. 66-117(b)" would enable the Commission to exercise its discretion to restart the 240-day period. (Staff's reply, p. 5).

There appears to be a consensus among the parties, according to Staff, that the Commission has jurisdiction until FERC grants Kansas Pipeline the Section 7 Natural Gas Act authority. Even though the Commission continues to have jurisdiction for at least a short period of time "does not mean . . . the Commission should exercise that authority and approve expansion of the KPP interstate system through the proposed construction projects envisioned in the current applications." (Staff's reply, pp. 5-6). Staff believes approving additional sales volumes from Kansas Pipeline to Western Resources would be "unwise" since FERC Order 636 would require

Kansas Pipeline "to cease its merchant function." (Staff's reply, p. 6).

Staff has outlined three options available to the Commission at this time:

> First, dissolve the stay and determine this matter on the merits, issuing an order no later than November 27, 1995, (in which case Staff would refer the Commission to its Post-Hearing Brief and urge that the applications be denied for lack of merit).;
>
> Second, issue an order restarting the 240-day period due to the November 2, 1995 FERC Order finding KPP (Kansas Pipeline) to be subject to federal NGA jurisdiction and maintain its stay of these proceedings until FERC resolves any petition for rehearing filed by KPP; or
>
> Finally, to dissolve the stay and to reconsider its Orders of June 22, 1995, and June 26, 1995, in light of the materially changed circumstances, and dismiss all pending applications without prejudice to further consideration of the merits in the unlikely event FERC reverses its Order and determines that it does not have jurisdiction over KPP pursuant to the NGA. Such an order

would also have to be issued no later than November 27, 1995.

(Staff's reply, p. 6). Staff recommends, out of the options presented, that the Commission reaffirm its order staying this action pending a final order from FERC on reconsideration and that the Commission restart the 240-day period based on the fact that FERC's order substantially altered the basis for the requested change. Staff believes the legislature contemplated relief from the 240-day period for circumstances such as these and neither Kansas Pipeline nor Western Resources should use this provision to pressure the Commission into a decision. (Staff's reply, p.8).

Kansas Pipeline takes issue with Staff's suggestion that the 180-day suspension orders were extended by "implication." Kansas Pipeline argues that "[p]rior to September 27, 1995, the Commission could arguably have entered an order extending the suspension period up to the full 240 days; however, neither Staff, nor any other party, requested such an extension and the Commission did not do so on its own motion or of its own accord." (Kansas Pipeline's reply, pp.3-4). Kansas Pipeline does not believe the deadline for submission of briefs after the expiration of the 180-day suspension order to constitute a written statement pursuant to K.S.A. 66-117. Kansas Pipeline also does not believe an "order by implication" satisfies the requirement that orders must be in writing. K.A.R. 2-1-232. (Kansas Pipeline's reply, p.5). Kansas Pipeline did not suggest that the Commission lost jurisdiction after expiration of the suspension orders. Kansas Pipeline also disputes Staff's reference to K.S.A. 66-1,203 and 66-1,204 for the proposition that the 240-day period is inapplicable. Kansas Pipeline believes only K.S.A. 66-117(b) governs time limitations in

Docket Nos. 192,506-U and 192,507-U. (Kansas Pipeline's reply, p.6)

Kansas Pipeline disagrees with Staff's recommendation that FERC's November 2, 1995 Order altered the facts used as the basis for the change in rates. Kansas Pipeline does not believe the Commission's order staying this proceeding constitutes an adjudication on the merits or sufficient grounds to restart the 240-day time period. Kansas Pipeline believes the three options presented by staff are erroneous and ignore the statutory deadlines. (Kansas Pipeline's reply, pp.8-9).

WNG has filed a reply to Kansas Pipeline's response to Staff's Motion for Stay. WNG suggests the following alternatives for Commission action:

(i) entering an order of dismissal for lack of subject matter jurisdiction (without prejudice to further consideration on the merits in the event of a final determination that FERC lacks jurisdiction over its operations) no later than November 27, 1995;

(ii) dismissing KPP's applications unless each is amended on or before November 27, 1995, to address the materially changed factual circumstances presented by FERC's November 2, 1995 Order; or

(iii) denying KPP's applications on the merits for the factual and legal reasons set forth in the post-hearing

submissions of the Staff and the Intervenors.

(WNG's reply, p.2)

WNG recognizes the Commission's problem as to whether it has jurisdiction after FERC's November 2, 1995 Order in Docket Nos. RP95-212-000 and RP95-395-000. WNG is concerned that Commission inaction would result in the "unpalatable possibility that the proposed contracts may become effective by operation of law after November 27, 1995.". (WNG's reply, p.2)

WNG also outlines the procedural history of these dockets. WNG references the fact that Kansas Pipeline never argued the contracts were effective by operation of law on September 27, 1995, when the hearing was extended to accommodate Dr. Stalon's testimony, one of Kansas Pipeline's witnesses. (WNG's reply, p.7). Nor did Kansas Pipeline, according to WNG, make this representation when the Commission announced the briefing schedule on September 6, 1995.

WNG believes that "[i]f the time limits of K.S.A. 66-117(b) are applicable to these proceedings, this statute further provides that 'any amendment to an application for a proposed change' which 'substantially alters the facts used as a basis for such requested change' may, in the Commission's discretion, 'be deemed a new application and the 240-day period shall begin again from the date of the filing of the amendment.'" (WNG's reply, p.8). Although Kansas Pipeline has not filed an amendment, WNG interprets the FERC's November 2, 1995 Order as changing the "factual bases for these applications." (WNG's reply, p.8). For instance, WNG referenced the fact

that the proposed contracts bundle both sales and transportation while as interstate pipeline, those services would need to be unbundled. (WNG's reply, p.8).

WNG contends Kansas Pipeline's position before the Kansas Corporation Commission, maintaining that the Commission has ongoing jurisdiction, is inconsistent with its position before FERC. Kansas Pipeline has sought a stay from FERC's November 2, 1995 Order on the grounds that FERC is depriving the Commission of its "regulatory jurisdiction." (WNG's reply, pp.8-9)

WNG also cites page 18 of FERC's November 2, 1995 Order "which sought . . . to prohibit KPP from 'constructing new pipelines or any expansions or extensions of existing pipelines without [Federal Energy Regulatory] Commission approval to the extent such construction requires Commission approval. See FERC Docket No. RP95-395-000 (Complaint of Williams Natural Gas Company, dated July 21, 1995, p. 63 at ¶ (e))." (WNG's reply, p.10). Moreover, before any construction for facilities or extension are put in force, the interstate pipeline must have a FERC certificate. (WNG's reply, p.10). WNG cites authority which support the proposition that a state utilities Commission cannot exercise concurrent jurisdiction with FERC. 15 USC § 717f(c)(1)(A); *Cascade Natural Gas Corp. v. F.E.R.C.*, 955 F.2d 1412 (10th Cir. 1992); *National Fuel Gas Supply Corp. v. Public Service Comm'n of State of New York*, 894 F.2d 571 (2d Cir. 1990).

WNG suggests that Kansas Pipeline could seek an interim certificate from FERC to avoid any detrimental impact on its proposals. (WNG's reply, p.11). Moreover, WNG states that "none of the proposed contracts involve sales or transportation of natural gas during the 1995-96 winter heating

season." In summary, WNG seeks dismissal "of the pending applications for lack of subject matter jurisdiction (without prejudice to further consideration on the merits in the event of a final determination that FERC lacks jurisdiction over its operations) no later than November 27, 1995, or to immediately dismiss KPP's pending applications unless it amends each no later than November 27, 1995, to address the materially changed factual circumstances presented by FERC's November 2, 1995 Order and, in such event, to restart the 240-day period for a final order hearing if deemed necessary." (WNG's reply, p. 12). In the alternative, WNG seeks to have the Commission deny Kansas Pipeline's applications or "issue an order disapproving any new services and related pipeline construction on or before November 27, 1995." (WNG's reply, p. 12).

Findings and Conclusions

The Commission does not give any credence to the argument raised by Kansas Pipeline that the subject contracts (Docket Nos. 192,506-U and 192,507-U) became effective by operation of law on September 27, 1995, the expiration of the 180-day suspension orders. The suspension orders entered April 20, 1995, clearly provided they were subject to any further order(s) of the Commission. Subsequent procedural orders setting this matter for hearing superseded the earlier suspension orders and the Commission so finds. Moreover, on September 6, 1995, the Commission specifically directed the parties to file briefs and/or findings of fact and conclusions of law by October 6, 1995. No objection was raised by Kansas Pipeline or any other party to the October 6, 1995 date for purposes of closing the record. Had the parties felt the contracts became effective September 27, 1995, there would have been no need for briefs, etc. The Commission deems

Kansas Pipeline's failure to timely object to the Commission's September 6, 1995 bench ruling as a waiver of their objection.

The Commission concurs with WNG's contention that the Commission's Order of November 3, 1995, is probably a sufficient adjudication within the 240-day period of time. The Commission's Order granting the stay was based on FERC's official Order of November 2, 1995, which memorialized FERC's decision from its October 25, 1995 agenda.

The Commission adopts Staff's recommendation and, to the extent (if any) K.S.A. 66-117(b) applies, shall restart the 240-day clock. K.S.A. 66-117(b) specifically grants the Commission discretion to restart the 240-day time period when a substantial alteration of the facts occurs which formed the basis for Kansas Pipeline's requested change, i.e., FERC's finding that Kansas Pipeline is an interstate pipeline subject to the NGA. The Commission shall restart the 240-day clock as of November 2, 1995, the date of FERC's order finding Kansas Pipeline to be an interstate pipeline.

The Commission recognizes the concerns raised by Ottawa and Paola as to the need to have a decision in order to determine outstanding franchise and easement questions. However, the Commission believes that a continued stay at this juncture serves the public interest especially in light of the unbundling concerns raised by Staff should FERC ultimately find it has jurisdiction over Kansas Pipeline. The Commission believes the benefits to a short stay pending FERC's issuance of a final appealable order outweighs any potential harm caused by the delay. The Commission shall continue to exercise jurisdiction over Kansas Pipeline until such time as FERC grants Kansas Pipeline certificates or otherwise resolves the pending dockets (Docket Nos. RP95-212-000 and RP95-

395-000). The Commission does not, however, believe this requires the Commission to decide whether to approve contracts, which may not be appropriate under FERC Order 636, as a prudent exercise of the Commission's discretion at this time.

IT IS, THEREFORE, BY THE COMMISSION ORDERED THAT:

1. The Commission's procedural orders setting these consolidated dockets for hearing superseded any prior suspension orders.

2. The Commission affirms its November 3, 1995 Order and stays consideration of these dockets until FERC has taken final appealable action.

3. The Commission shall restart the 240-day time period (to the extent, if any, that it applies) as of November 2, 1995.

A party may file a petition for reconsideration of this order within fifteen (15) days from the date of this order. If service is by mail, three (3) additional days may be added to the fifteen (15) day time limit to petition for reconsideration.

The Commission retains jurisdiction over the subject matter and the parties for the purpose of entering such further order or orders as it may deem necessary.

BY THE COMMISSION IT IS SO ORDERED.

Seltsam, Chr.; Alexander, Com.; McKee, Com.

Dated: November 22, 1995.

[ORDER MAILED]
[NOV 22 1995]
[JUDITH MCCONNELL]
[EXECUTIVE DIRECTOR]

/s/

Judith McConnell
Executive Director

APPENDIX E

THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS

Before Commissioners: Susan M. Seltsam, Chair
F. S. Jack Alexander
Timothy E. McKee

In the Matter of the Filing of Kansas Pipeline Partnership for approval and to make effective certain firm gas purchase contracts between Kansas Pipeline Partnership and Western Resources, Inc.	)	Docket No. 192,506-U
In the Matter of the Application of Western Resources for an order approving certain contracts with Kansas Pipeline Partnership, and authorizing inclusion of costs related to such contract in Western Resources' purchased gas adjustment clause for recover from its customers.	)	Docket No. 192,391-U
In the Matter of the Filing of Kansas Pipeline for approval and to make effective certain gas transportation service agreements between Kansas Pipeline Partnership and Western Resources, Inc.	)	Docket No. 192,507-U

ENTERED
DEC 8 1995

ORDER

This matter is before the State Corporation Commission of the State of Kansas (Commission) on Kansas Pipeline Partnership's (KPP's) Petition for Reconsideration or, in the

Alternative, Petition for Hearing. KPP appeared by James P. Zakoura, Richard W. Hird and Fred J. Logan, Jr. KPP seeks reconsideration of the Commission's November 3, 1995 Order which preliminarily stayed the above-captioned actions due to FERC's Order issued on November 2, 1995, and in order to give parties an opportunity to respond to Staff's Motion for Stay. After the parties were given an opportunity to file responses to Staff's Motion for Stay, the Commission issued a subsequent order on November 22, 1995, which supersedes the Commission's November 3 Order.

Accordingly, KPP's petition for reconsideration and request for a hearing on the November 3, 1995 Order is denied since the November 22, 1995 Order supersedes the November 3, 1995 Order and continues the stay of these proceedings.

IT IS, THEREFORE, BY THE COMMISSION ORDERED THAT:

Kansas Pipeline Partnership's Petition for Reconsideration or, in the Alternative, Petition for Hearing is denied.

Kansas Pipeline Partnership has exhausted its administrative remedies as to the November 3, 1995 Order.

The Commission retains jurisdiction over the subject matter and the parties for the purpose of entering such further order or orders as it may deem necessary.

BY THE COMMISSION IT IS SO ORDERED.

Seltsam, Chr.; Alexander, Com.; McKee, Com.

Dated: December 8, 1995

[ORDER MAILED]
[DEC 8 1995]
[JUDITH MCCONNELL]
[EXECUTIVE DIRECTOR]

/s/
Judith McConnell
Executive Director

APPENDIX F

THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS

Before Commissioners: Susan M. Seltsam, Chair
F. S. Jack Alexander
Timothy E. McKee

In the Matter of the Filing of Kansas Pipeline Partnership for approval and to make effective certain firm gas purchase contracts between Kansas Pipeline Partnership and Western Resources, Inc.	)	Docket No. 192,506-U
In the Matter of the Application of Western Resources for an order approving certain contracts with Kansas Pipeline Partnership, and authorizing inclusion of costs related to such contract in Western Resources' purchased gas adjustment clause for recovery from its customers.	)	Docket No. 192,391-U
In the Matter of the Filing of Kansas Pipeline for approval and to make effective certain gas transportation service agreements between Kansas Pipeline Partnership and Western Resources, Inc.	)	Docket No. 192,507-U

ENTERED
DEC 28 1995

ORDER

This matter is before the Kansas Corporation Commission (KCC) on Kansas Pipeline Partnership's (KPP) "Petition for Reconsideration of November 22, 1995 Order."

KPP appeared by James P. Zakoura, Richard W. Hird and Fred J. Logan, Jr. The KCC notes that it has filed a petition for rehearing before the Federal Energy Regulatory Commission (FERC) in Docket Nos. RP95-212-000 and RP95-395-000 which is still pending. The resolution of these FERC dockets will determine the jurisdictional issues regarding KPP. The KCC recognizes that Western Resources, Inc., one of the Joint Applicants, will remain Kansas jurisdictional notwithstanding FERC's ruling. Western Resources, Inc. has not sought reconsideration of the November 22, 1995 Order or responded to KPP's petition for reconsideration. Accordingly, the Commission finds no reason to alter its prior decision at this time. The Order of November 22, 1995 is affirmed for the reasons stated in that Order and the stay of the above-captioned dockets will remain in place subject to further order or orders of the KCC.

IT IS, THEREFORE, BY THE COMMISSION ORDERED THAT: KPP's "Petition for Reconsideration of November 22, 1995 Order" is denied. KPP has exhausted its administrative remedies as to the November 22, 1995 Order.

The KCC retains jurisdiction over the subject matter and the parties for the purpose of entering such further order or orders as it may deem necessary.

BY THE COMMISSION IT IS SO ORDERED.

Seltsam, Chr.; Alexander, Com.; McKee, Com.

Dated: December 28, 1995

[ORDER MAILED]
[DEC 28 1995]
[JUDITH MCCONNELL]
[EXECUTIVE DIRECTOR]

/s/
Judith McConnell
Executive Director

APPENDIX G

AMENDMENT XIV - CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of Congress, or as an officer of the United

States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

APPENDIX H

66-117. Change of rates or schedules; procedure; effective date; higher rates of return in certain cases; hearing; property tax surcharge authorized. (a) Unless the state corporation commission otherwise orders, no common carrier or public utility over which the commission has control shall make effective any changed rate, joint rate, toll, charge or classification or schedule of charges, or any rule or regulation or practice pertaining to the service or rates of such public utility or common carrier except by filing the same with the commission at least 30 days prior to the proposed effective date. The commission, for good cause, may allow such changed rate, joint rate, toll, charge, charge or classification or schedule of charges, or rule or regulation or practice pertaining to the service or rates of any such public utility or common carrier to become effective on less than 30 days' notice. If the commission allows a change to become effective on less than 30 days' notice, the effective date of the allowed change shall be the date established in the commission order approving such change, or the date of the order if no effective date is otherwise established. Any such proposed change shall be shown by filing with the state corporation commission a schedule showing the changes, and such changes shall be plainly indicated by proper reference marks in amendments or supplements to existing tariffs, schedules or classifications, or in new issues thereof.

(b) Whenever any common carrier or public utility governed by the provisions of this act files with the state corporation commission a schedule showing the changes desired to be made and put in force by such public utility or common carrier, the commission either upon complaint or upon its own motion, may give notice and hold a hearing upon such proposed changes, Pending such hearing, the commission may suspend the operation of such schedule and defer the effective date of such change in rate, joint rate, toll, charge or classification or schedule of charges, or any rule or regulation

or practice pertaining to the service or rates of any such public utility or common carrier by delivering to such public utility or common carrier a statement in writing of its reasons for such suspension. The commission shall not delay the effective date of the proposed change in rate, joint rate, toll, charge or classification or schedule of charges, or in any rule or regulation or practice pertaining to the service or rates of any such public utility or common carrier, more than 240 days beyond the date the public utility or common carrier filed its application requesting the proposed change. If the commission does not suspend the proposed schedule within 30 days of the date the same is filed by the public utility or common carrier, such proposed schedule shall be deemed approved by the commission and shall take effect on the proposed effective date. If the commission has not issued a final order on the proposed change in any rate, joint rate, toll, charge or classification or schedule of charges, or any rule or regulation or practice pertaining to the service or rates of any such public utility or common carrier, within 240 days after the carrier or utility files its application requesting the proposed change, then the schedule shall be deemed approved by the commission and the proposed change shall be effective immediately, except that (1) for purposes of the foregoing provisions regarding the period of time within which the commission shall act on an application, any amendment to an application for a proposed change in any rate, which increases the amount sought by the public utility or common carrier or substantially alters the facts used as a basis for such requested change of rate, shall, at the option of the commission, be deemed a new application and the 240-day period shall begin again from the date of the filing of the amendment, and (2) if hearings are in process before the commission on a proposed change requested by the public utility or common carrier on the last day of such 240-day period, such period shall be extended to the end of such

hearings plus 20 days to allow the commission to prepare and issue its final order.

(c) Except as provided in subsection (b), no change shall be made in any rate, toll, charge, classification or schedule of charges or joint rates, or in any rule or regulation or practice pertaining to the service or rates of any such public utility or common carrier, without the consent of the commission. Within 30 days after such changes have been authorized by the state corporation commission or become effective as provided in subsection (b), copies of all tariffs, schedules and classifications, and all rules and regulations, except those determined to be confidential under rules and regulations adopted by the commission, shall be filed in every station, office or depot of every such public utility and every common carrier in this state, for public inspection.

(d) Upon a showing by a public utility before the state corporation commission at a public hearing and a finding by the commission that such utility has invested in projects or systems that can be reasonably expected (1) to produce energy from a renewable resource other than nuclear for the use of its customers, (2) to cause the conservation of energy used by its customers, or (3) to bring about the more efficient use of energy by its customers, the commission may allow a return on such investment equal to an increment of from 1/2% to 2% plus an amount equal to the rate of return fixed for the utility's other investment in property found by the commission to be used or required to be used in its services to the public. The commission may also allow such higher rate of return on investments by a public utility in experimental projects, such as load management devices, which it determines after public hearing to be reasonable designed to cause more efficient utilization of energy and in energy conservation programs or

measures which it determines after public hearing provides a reduction in energy usage by its customers in a cost-effective manner.

(e) Whenever, after the effective date of this act, an electric public utility, a natural gas public utility or a combination thereof, files tariffs reflecting a surcharge on the utility's bills for utility service designed to collect the annual increase in expense charged on its books and records for ad valorem taxes, such utility shall report annually to the state corporation commission the changes in expense charged ad valorem taxes. For purposes of this section, such amounts charged to expense on the books and records of the utility may be estimated once the total property tax payment is known. If found necessary by the commission or the utility, the utility shall file tariffs which reflect the change as a revision to the surcharge. Upon a showing that the surcharge is applied to bills in a reasonable manner and is calculated to substantially collect the increase in ad valorem tax expense charged on the books and records of the utility, or reduce any existing surcharge based upon a decrease in ad valorem tax expense incurred on the books and records of the utility, the commission shall approve such tariffs within 30 days of the filing. Any over or under collection of the actual ad valorem tax increase charged to expense on the books of the utility shall be either credited or collected through the surcharge in subsequent periods. The establishment of a surcharge under this section shall not be deemed to be a rate increase for purposes of this act. The net effect of any surcharges established under this section shall be included by the commission in the establishment of base rates in any subsequent rate case filed by the utility.

(f) Except as to the time limits prescribed in subsection (b), proceedings under this section shall be conducted in accordance with the provisions of the Kansas administrative procedure act.

APPENDIX I

IN THE SUPREME COURT OF THE STATE OF KANSAS

KANSAS PIPELINE PARTNERSHIP,

Appellant,

vs.

THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS,

Appellee.

PETITION FOR REVIEW

APPEAL OF INTERVENOR WILLIAMS NATURAL GAS COMPANY FROM THE KANSAS COURT OF APPEALS

Kevin M. Fowler #11227
Frieden, Haynes & Forbes
400 SW 8th Street, P. O. Box 639
Topeka, Kansas 66601
(913) 232-7266

Counsel for Intervenor
Williams Natural Gas Company

PRAYER FOR REVIEW

Williams Natural Gas Company ("WNG") respectfully prays that the Kansas Supreme Court review the decision of the Kansas Court of Appeals in the case of Kansas Pipeline Partnership v. State Corporation Commission, No. 96-75,918, on the grounds that this case presents an important question of constitutional law and there is a need for this Court to exercise its supervisory authority pursuant to Kansas Supreme Court Rule 8.03(e)(1). Additionally, the importance of the impact of the Court of Appeals' ruling on Kansas ratepayers clearly merits this Court's review of the case. K.S.A. 20-3018(b)(1).

DATE OF COURT OF APPEALS' DECISION

The Court of Appeals rendered its decision in this case on May 17, 1996.

STATEMENT OF ISSUES FOR REVIEW

1. Whether a statute that allows gas transportation and construction contracts to be "deemed approved" without a consideration on the merits violates the United States Constitution's Fourteenth Amendment.

2. Whether the Court of Appeals erred by ignoring arguments raised by the parties in this proceeding, including invited error, procedural estoppel, and the Court's failure to properly apply K.A.R. 82-1-214.

STATEMENT OF FACTS

This is an appeal from a decision by the Corporation Commission of the State of Kansas ("KCC") in a docket filed by Kansas Pipeline Partnership ("KPP") seeking approval of five contracts (the "Contracts") with Western Resources, Inc.

("WRI"). The KCC held extensive hearings after exhaustive discovery in which KPP, WNG, KCC Staff, CURB, and various other parties were active participants. All parties submitted briefs. Before the KCC could issue a final decision, the Federal Energy Regulatory Commission ("FERC") ruled that KPP is actually part of a single interstate pipeline system subject to FERC's exclusive jurisdiction under the Natural Gas Act. KansOk Partnership, Kansas Pipeline Partnership, & Riverside Pipeline Co., 73 FERC ¶ 61,160 (1995). Upon learning of FERC's jurisdiction, the KCC determined the new jurisdictional status was, in effect, an amendment of the application to approve the Contracts and, on that basis, restarted the 240-day statutory decision period, if that period even applied. The KCC stayed further action in the consolidated dockets. KPP brought this appeal seeking a determination that the Contracts are deemed approved because the KCC failed to issue a final order within 240 days.

The Court of Appeals determined the 240-day time limit on a final decision by the KCC contained in K.S.A. 66-117(b) (the "Statute") applies to this matter. This Court should review that determination because the Court of Appeals interpreted the Statute incorrectly when it held that the Statute applies to this application to approve contracts. Brief of WNG at 6-9. The Court of Appeals' Opinion ("Opinion") also ignored several arguments raised by the parties. If those arguments had been fully considered by the court, it should have affirmed the KCC's action staying this matter pending a final decision by FERC concerning its jurisdiction. Furthermore, the Opinion ignores the provisions of K.A.R. 82-1-214. Most important, K.S.A. 66-117(b), as applied by the court, violates the Constitution's guarantee of due process of law by effectively removing WNG's right to notice and an opportunity to be heard on the merits. WNG filed a Motion for

Rehearing En Banc with the Court of Appeals on June 4, 1996. WNG urges this Court to grant its Petition for Review and find that the Contracts are not deemed approved by operation of law.

ARGUMENT AND AUTHORITIES

The Court of Appeals made several errors that merit this Court granting WNG's Petition for Review and reversing the Court of Appeals' decision. In particular, the court's application of the Statute deprived WNG's right to due process under the Constitution. Additionally, the Court ignored important arguments raised by WNG and other parties. Kansas ratepayers will suffer substantial financial harm if this Court does not review and reverse the Court of Appeals' decision.

I. THE COURT OF APPEALS' APPLICATION OF THE STATUTE VIOLATES CONSTITUTIONAL DUE PROCESS.

Kansas Supreme Court Rule 8.03(e)(1) grants a party Supreme Court review as a matter of right whenever a case involves a constitutional issue. The Court of Appeals' application of K.S.A. 66-117(b) violates the constitutional rights of the parties to this proceeding. The court's determination that the 240-day time period for rate cases applies to the approval of these Contracts seriously negated WNG's right to notice. Because the KCC did not require that KPP give the notice and make the filings required for rate cases, no party received the notice prong of procedural due process to which they were entitled. Moreover, by determining the Statute operates to remove WNG's and other parties' right to a determination on the merits and by effectively cutting off WNG's right to appeal the KCC's interim rulings, the court also

removed the parties' opportunity to be heard. Because the essence of procedural due process is notice and an opportunity to be heard, the court's interpretation of K.S.A. 66-117(b) rendered the Statute unconstitutional as applied. WNG is entitled to a review of the Court of Appeals' Opinion because that decision violates WNG's constitutional rights. On review, WNG urges this Court to find that the Contracts are not deemed approved by operation of law.

A. Due Process Requires Notice and an Opportunity to Be Heard.

The United States Constitution provides that the State shall not "deprive any person of life, liberty, or property, without due process of law . . . ." U.S. Const. amend. XIV. The protection provided by the Due Process Clause requires, at a minimum, "that deprivation of life, liberty, or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1949). The court's application of K.S.A. 66-117(b) prevented WNG from receiving those protections.

B. WNG Was Entitled to Due Process.

1. WNG Had a Protectible Interest.

A complete Due Process Clause analysis presents two inquiries for the Court: (1) was WNG deprived of a protected interest and (2) if so, what process was due? Logan v. Zimmerman Brush Co., 455 U.S. 422, 428 (1981). As a competitor of KPP, WNG had a protectible interest in participating in this proceeding.

Kansas law provides WNG with the right, as an interested competitor of KPP, to intervene and participate in KCC proceedings that affect WNG. K.A.R. §§ 82-1-225, 82-1-228 (1994). Because it is grounded in state law, this right is a form of "property" right, to which due process protection must be given. Logan, 455 U.S. at 430. WNG's ownership of substantial pipeline assets in Kansas, its employment of 300 Kansas citizens (R. Vol. 12, 1685-4 through 1685-5), and its provision of gas transportation services vital to the citizens of Kansas confirm that WNG has valuable property rights that deserve the protection of the Due Process Clause.

The court's application of K.S.A. 66-117(b) denied WNG the constitutional protection to which it is entitled. The Contracts, if deemed approved, will take significant contract demand from WNG and transfer it to KPP. R. Vol. 14, 2410-14. Contract demand is the service WNG sells and the vehicle by which it recovers its operating expenses and a reasonable rate of return established by FERC. It is the only source of earnings its significant pipeline assets generate. The approval of the Contracts will give KPP control of more than 50% of the gas transportation service market for Kansas City. Without these unwise contracts, WNG will serve about 73% of that market. R. Vol. 14, 2410-6 through 2410-7. WNG is entitled to the due process protection provided for by the United States Constitution in this case, which threatens WNG with a loss of its valuable property rights.

2. WNG Should Have Been Provided Notice and an Opportunity to Be Heard.

Because WNG had an established property right in the proceedings, the Court must next determine what process was required to protect that right. Generally, the Due Process

Clause has been held to protect litigants who seek to protect property or redress grievances in an adjudicative setting. Logan, 455 U.S. at 429. Several United States Supreme Court opinions provide due process analyses of cases analogous to the one presented to this Court.

In Societe Internationale v. Rogers, 357 U.S. 197 (1958), the Court determined that a party's case should not be dismissed based upon non-compliance with procedural rules. In particular, the Court noted the Due Process Clause limits the power of courts "to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause." Id. at 209. In Rogers, the Court found a due process violation when the plaintiff's case was dismissed because of the plaintiff's good-faith failure to comply with a court order. In this case WNG did not take any action that led to its loss of protection. Instead, the action that led to the deprivation of WNG's rights was taken by a third party -- the KCC. Nonetheless, the Court of Appeals' interpretation of K.S.A. 66-117(b) resulted in a complete loss of WNG's right to a decision on the merits based entirely on the inaction of the KCC. The loss of WNG's due process protection thus resulted from no fault of WNG whatsoever. Compared to the plaintiff in Rogers, WNG has an even stronger argument that it is entitled to a hearing to protect its interests.

Logan v. Zimmerman Brush Co., 455 U.S. 422 (1981) presents an even more compelling interpretation of the Due Process Clause. There the Court determined the dismissal of an employment claim because an agency neglected to act within a statutory time requirement violated the Due Process Clause. The statute in Logan was similar to K.S.A. 66-117(b). It required an agency to hold a hearing within 120 days of the filing of a complaint. Id. at 424. When the agency

inadvertently set the hearing date for five days after the statutory period, the claim was challenged by the employer and eventually dismissed. Id. at 426-27. In reversing that determination, the Supreme Court noted that once a state confers a property right like the right to a hearing, any statutory limitation on the right will be subjected to constitutional scrutiny. Id. at 432. "[T]he State may not finally destroy a property interest without first giving the putative owner an opportunity to present his claim of entitlement." Id. at 434.

WNG's situation is clearly analogous. The Court of Appeals' application of the Statute operated to bar WNG's participation in a determination on the merits in the same manner that Logan's rights were barred. Like the agency in Logan, the KCC failed to follow the State's procedural guidelines. As in Logan, WNG was not at fault. In fact, WNG was powerless to stop the Statute's application. To deny WNG's rights under such circumstances is patently unfair and clearly violates the Due Process Clause.

A property owner's rights "are not diminished by the fact that the State may have specified its own procedures that it may deem adequate for determining the preconditions to adverse official action." Vitek v. Jones, 445 U.S. 480, 491 (1980). Unfortunately, WNG's rights were diminished by the court's application of K.S.A. 66-117(b). Because such application removed WNG's due process protection, this Court should grant this Petition and reverse the Court of Appeals.

The court's decision also had the effect of removing WNG's right to notice inherent in its due process rights. See Lawrence Preservation Alliance, Inc. v. Allen Realty, Inc., 16 Kan. App. 2d 93, 819 P.2d 138 (1992). WNG filed a motion with the KCC seeking dismissal of the applications for failure

to give the notice required by a rate case and make the filings required in a rate case. R. Vol. 1, 304. At KPP's insistence, the KCC denied WNG's motion and declined to force KPP to give notice and make filings required in a rate case. That decision necessarily included a determination that this proceeding was not a rate case. The requirements for filings and proper notice apply in a rate case because the KCC must make a prompt decision. In other cases there is no artificial time limit and therefor no similar need for heightened procedural notice. The court's determination that the Contracts are deemed approved by operation of law turned this case on its head by applying the strict, punitive time limits of the Statute in a case where none of the notice and procedural safeguards applied to rate cases have been enforced. The combination of the KCC's failure to require the notice and filings associated with a rate case and the court's application of the 240-day time limit had the effect of denying WNG and other parties the notice to which they are entitled by the most fundamental concepts of due process.

The KCC's ruling on WNG's motion seeking dismissal of the Applications leads to another important consideration in this case. WNG's exception to the KCC's ruling on WNG's motion remains preserved for consideration on appeal of the KCC's final ruling in this docket. The court's ruling that the Contracts are deemed approved by operation of law removed WNG's right to appeal the KCC's ruling on WNG's motion because it eliminated a final order and the right of WNG to appeal from such an order. If WNG had been permitted a right to appeal the KCC's denial of its motion, WNG would have had an opportunity to reverse an approval of the Contracts even if that decision were based on the merits of the Contracts. The court's elimination of WNG's right to an appeal on this critical

issue amounted to a further denial of WNG's due process protection.

II. THIS APPEAL PRESENTS IMPORTANT ISSUES THAT MERIT SUPREME COURT REVIEW

Even if WNG is not entitled to a review as a matter of right, this Court should grant WNG's Petition because of the important issues involved. The Court of Appeals' decision in this case will have an impact that affects a significant portion of the Kansas population. If the Contracts remain "deemed approved," Kansas ratepayers could eventually pay for the Contracts' costs through WRI's gas rates. Additionally, this is a case of first impression. As the Court of Appeals' Opinion recognized, no published decision has ever determined the time limits in K.S.A. 66-117 apply to utility contracts. These two factors clearly merit this Court's review. K.S.A. 20-3018(b)(1).

On June 10, 1996, WRI filed a response to KCC's Motion for Rehearing in the Court of Appeals. In that response, WRI attempts to "piggyback" the Court of Appeals' approval of the Contracts into a method by which WRI can pass the Contracts' costs along to Kansas ratepayers. As WNG, CURB, KCC Staff, and others set forth at length at the hearing in this matter, the Contracts are unwise and significantly over-priced. Based on the compelling showing on the merits, the KCC would not have approved the Contracts or WRI's application for pass-through of the costs. Had the KCC approved the Contracts on the merits, its decision would have been reversed on appeal. Thus, in this appeal, WRI and KPP are attempting to accomplish by the KCC's omission an end which they could not accomplish by the KCC's volition. This Court should not permit such a result in a matter of such great public importance. Clearly, based upon the magnitude of the

costs to be paid by Kansas ratepayers, this appeal presents issues of great importance to the Kansas public.

Quite apart from the threat of millions of dollars of unnecessary utility bills, this appeal raises issues of first impression for this Court. The Court of Appeals applied K.S.A. 66-117 to the Contracts. As the Court's Opinion noted, no previous decision has held contracts to fall within the scope of the statute. Because this appeal presents matters of first impression that will likely arise again, the Court should grant WNG's Petition and review and reverse the Court of Appeals' decision.

...

IV. CONCLUSION.

This Court should grant WNG's Petition for Review and find that the Contracts are not deemed approved by operation of law. This is a case of first impression which considers issues of significant importance to the citizens of Kansas. Moreover, the Court of Appeals' decision renders K.S.A. 66-117 unconstitutional as applied. The court's ruling effectively deprived WNG of its constitutional right to notice and an opportunity to be heard and must therefor be reversed. The Court of Appeals' Opinion in this case also ignored important arguments and the facts supporting the conclusion that KPP is estopped from arguing the 240-day time limit included in K.S.A. 66-117(b) should apply in this case. The Court of Appeals incorrectly interpreted K.S.A. 66-17(b) and that interpretation should be reversed on review.

Respectfully submitted,

/s/_____

John C. Frieden #06592
Kevin M. Fowler #11227
Frieden, Haynes & Forbes
400 SW 8th Street, P. O. Box 639
Topeka, Kansas 66601
(913) 232-7266

David P. Batow, General Counsel
Gary W. Boyle, Senior Attorney
Jay V. Allen, Attorney
Williams Natural Gas Company
4100 One Williams Center
Tulsa, Oklahoma 74172
(918) 588-2359

Counsel for Intervenor
Williams Natural Gas Company

APPENDIX J

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

KANSAS PIPELINE PARTNERSHIP,	)	
	)	
Petitioner/Appellee,	)	
	)	
v.	)	
	)	Case No.
	)	96-75918-A
	)	
THE STATE CORPORATION COMMISSION OF THE STATE OF KANSAS,	)	
	)	
Respondent/Appellant.	)	
	)	

MOTION FOR REHEARING EN BANC

COMES NOW Intervenor, Williams Natural Gas Company ("WNG"), and pursuant to Supreme Court Rules 7.02(b) and 7.05, files this motion seeking rehearing en banc of the ruling of the Court of Appeals determining that Appellees' contracts were approved as a matter of law. The Opinion of the Court, dated May 17, 1996, is attached hereto. WNG respectfully requests the Court reconsider this decision.

ARGUMENT

I. BACKGROUND.

This is an appeal from a decision by the Corporation Commission of the State of Kansas ("KCC") in a docket filed by Kansas Pipeline Partnership ("KPP") seeking approval of five contracts (the "Contracts") with Western Resources, Inc.

("WRI"). The KCC held extensive hearings after exhaustive discovery in which KPP, WNG, KCC Staff, CURB, and various other parties were active participants. All parties submitted briefs. Before the KCC could issue a final decision, the Federal Energy Regulatory Commission ("FERC") ruled that KPP is actually part of a single interstate pipeline system subject to FERC's exclusive jurisdiction under the Natural Gas Act. KansOk Partnership, Kansas Pipeline Partnership, & Riverside Pipeline Co., 73 FERC ¶ 61,160 (1995). Upon learning of FERC's jurisdiction, the KCC determined the new jurisdictional status was, in effect, an amendment of the application to approve the Contracts and, on that basis, restarted the 240-day statutory decision period, if that period even applied to this matter. The KCC stayed further action in the consolidated dockets. KPP brought this appeal seeking a determination that the Contracts are deemed approved because the KCC failed to issue a final order within 240 days.

This Court determined the 240-day time limit contained in K.S.A. 66-117(b) (the "Statute") applies to this matter and the change in KPP's jurisdictional status was not an amendment of the application. WNG seeks rehearing in this Court because the Court's Opinion ignores several arguments raised by the parties. If those arguments had been fully considered by the Court, it should have affirmed the KCC's action staying this matter until the conclusion of the restarted 240-day decision period or a final decision by FERC concerning its jurisdiction. Furthermore, the Court's Opinion ignores the provisions of K.A.R. 82-1-214. Most important, K.S.A. 66-117(b), as applied by this Court, violates the Constitution's guarantee of due process of law by effectively removing WNG's and other parties' notice and opportunity to be heard on the merits. WNG urges the Court to grant its Motion for Rehearing and find that the Contracts are not deemed approved by operation of law.

. . .

IV. THE COURT'S APPLICATION OF THE STATUTE VIOLATES CONSTITUTIONAL DUE PROCESS.

The Court's application of K.S.A. 66-117(b) violates the constitutional rights of the parties to this proceeding. This Court's determination that the 240-day time period for rate cases applies to the approval of these Contracts seriously negates WNG's right to notice. Because the KCC did not require that KPP give the notice and make the filings required for rate cases, no party has received the notice prong of procedural due process to which they were entitled. Moreover, by determining that the Statute operates to remove WNG's and other parties' right to a determination on the merits of the reasonableness and public interest invoked by the proposed Contracts and by effectively cutting off WNG's right to appeal the KCC's interim rulings, the Court has also removed the parties' opportunity to be heard. Because the essence of procedural due process is notice and an opportunity to be heard, this Court's interpretation of K.S.A. 66-117(b) renders the Statute unconstitutional as applied. WNG urges the Court to reconsider its decision in light of the constitutional rights of the parties and to find that the Contracts are not deemed approved by operation of law.

A. Due Process Requires Notice and an Opportunity to Be Heard.

The United States Constitution provides that the State shall not "deprive any person of life, liberty, or property, without due process of law . . . ." U.S. Const. amend. XIV. The protection provided by the Due Process Clause requires, at a minimum, "that deprivation of life, liberty, or property by

adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1949). This Court's application of K.S.A. 66-117(b) prevents WNG from receiving those protections.

B. WNG Was Entitled to Due Process.

1. WNG Had a Protectible Interest.

A complete Due Process Clause analysis presents two inquiries for the Court: (1) was WNG deprived of a protected interest and (2) if so, what process was due? Logan v. Zimmerman Brush Co., 455 U.S. 422, 428 (1981). As a competitor of KPP, WNG had a protectible interest in participating in this proceeding.

Kansas law provides WNG with the right, as an interested competitor of KPP, to intervene and participate in KCC proceedings that affect WNG. K.A.R. §§ 82-1-225, 82-1-228 (1994). Because it is grounded in state law, this right is a form of "property" right, to which due process protection must be given. Logan, 455 U.S. at 430. WNG's ownership of substantial pipeline assets in Kansas, its employment of 300 Kansas citizens (R. Vol. 12, 1685-4 through 1685-5) and its provision of gas transportation services vital to the citizens of Kansas confirm that WNG has valuable property rights that deserve the protection of the Due Process Clause.

This Court's application of K.S.A. 66-117(b) has denied WNG the constitutional protection to which it is entitled. The Contracts that are the subject of this proceeding, if deemed approved, will take significant contract demand from WNG and transfer it to KPP. R. Vol. 14, 2410-14. Contract demand

is the service WNG sells and the vehicle by which it recovers its operating expenses and a reasonable rate of return established by FERC. It is the only source of earnings that the significant pipeline assets it owns can generate. The approval of the Contracts will give KPP control of more than 50% of the gas transportation service market for Kansas City. Without these unwise contracts, WNG will serve about 73% of that market. R. Vol. 14, 2410-6 through 2410-7. WNG is entitled to the due process protection provided for by the United States Constitution in this case, which threatens WNG with a loss of its valuable property rights.

2. WNG Should Have Been Provided Notice and an Opportunity to Be Heard.

Because WNG had an established property right in the proceedings, the Court must next determine what process was required to protect WNG's rights. Generally, the Due Process Clause has been held to protect litigants who seek to protect property or redress grievances in an adjudicative setting. Logan, 455 U.S. at 429. Several United States Supreme Court opinions provide due process analyses of cases analogous to the one presented to this Court.

In Societe Internationale v. Rogers, 357 U.S. 197 (1958), the Court determined that a party's case should not be dismissed based upon non-compliance with procedural rules. In particular, the Court noted that the Due Process Clause limits the power of courts "to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause." Id. at 209. In Rogers, the Court found a due process violation when the plaintiff's case was dismissed because of the plaintiff's good-faith failure to comply with a court order. In this case WNG did not take any action that led

to its loss of protection. Instead, the action that led to the deprivation of WNG's rights was taken by a third party -- the KCC. Nonetheless, this Court's interpretation of K.S.A. 66-117(b) results in a complete loss of WNG's right to a decision on the merits based entirely on the inaction of the KCC. The loss of WNG's due process protection thus resulted from no fault of WNG whatsoever. Compared to the plaintiff in Rogers, WNG has an even stronger argument that it is entitled to a hearing to protect its interests.

Logan v. Zimmerman Brush Co., 455 U.S. 422 (1981) presents an even more compelling interpretation of the Due Process Clause. There the Court determined that the dismissal of an employment claim because an agency neglected to act within a statutory time requirement violated the Due Process Clause. The statute in Logan was similar to K.S.A. 66-117(b). It required an agency to hold a hearing within 120 days of the filing of a complaint. Id. at 424. When the agency inadvertently set the hearing date for five days after the statutory period, the claim was challenged by the employer and eventually dismissed. Id. at 426-27. In reversing that determination, the Supreme Court noted that once a state confers a property right like the right to a hearing, any statutory limitation on the right will be subjected to constitutional scrutiny. Id. at 432. "[T]he State may not finally destroy a property interest without first giving the putative owner an opportunity to present his claim of entitlement." Id. at 434.

WNG's situation is clearly analogous. The Statute operated to bar WNG's participation in a determination on the merits in the same manner that Logan's rights were barred. Like the agency in Logan, the KCC failed to follow the State's procedural guidelines. As in Logan, WNG was not at fault. In fact, WNG was powerless to stop the Statute's application. To

deny WNG's rights under such circumstances is patently unfair and clearly violates the Due Process Clause.

A property owner's rights "are not diminished by the fact that the State may have specified its own procedures that it may deem adequate for determining the preconditions to adverse official action." Vitek v. Jones, 445 U.S. 480, 491 (1980). Unfortunately, WNG's rights were diminished by this Court's application of K.S.A. 66-117(b). Because such application removed WNG's due process protection, the Court should grant WNG's Motion for Rehearing.

This Court's decision also has the effect of removing WNG's right to notice inherent in its due process rights. See Lawrence Preservation Alliance, Inc. v. Allen Realty, Inc., 16 Kan. App.2d 93, 819 P.2d 138 (1992). The Court will recall that WNG filed a Motion with the KCC seeking dismissal of the applications for failure to give the notice required by a rate case and make the filings required in a rate case. R. Vol. 1, 304. At KPP's insistence, the KCC denied WNG's motion and declined to force KPP to give notice and make filings required in a rate case. That decision necessarily included a determination that this proceeding was not a rate case. The requirements for filings and proper notice apply in a rate case because the KCC must make a prompt decision. In other cases there is no artificial time limit and therefor no similar need for heightened procedural notice. This Court's determination that the Contracts are deemed approved by operation of law has turned this case on its head by applying the strict, punitive time limits of the Statute in a case where none of the notice and procedural safeguards applied to rate cases have been enforced. The combination of the KCC's failure to require the notice and filings associated with a rate case and this Court's application of the 240-day time limit have the effect of denying WNG and

other parties the notice to which they are entitled by the most fundamental concepts of due process.

The KCC's ruling on WNG's motion seeking dismissal of the Applications leads to another important consideration on rehearing in this case. WNG's exception to the KCC's ruling on WNG's motion remains preserved for consideration on appeal of the KCC's final ruling in this docket. This Court's ruling that the Contracts are deemed approved by operation of law removes WNG's right to appeal the KCC's ruling on WNG's motion because it eliminates a final order and the right of WNG to appeal from such an order. If WNG had been permitted a right to appeal the KCC's denial of its motion, WNG would have had an opportunity to reverse an approval of the Contracts even if that decision was based on the merits of the Contracts. This Court's elimination of WNG's right to an appeal on this critical issue amounts to a further denial of WNG's due process protection.

V. CONCLUSION.

This Court should grant WNG's Motion for Rehearing En Banc and, after rehearing, find that the Contracts are not deemed approved by operation of law. The Court's Opinion in this case ignored important arguments and the facts that support the conclusion that KPP is estopped from arguing the 240-day time limit included in K.S.A. 66-117(b) should apply in this case. Most important, this Court has applied the Statute in a manner that violates the Due Process Clause of the United States Constitution. This Court's ruling effectively deprives WNG of its constitutional right to notice and an opportunity to be heard and must therefor be reversed.

Respectfully submitted,

/s/_____

John C. Frieden #06592
Kevin M. Fowler #11227
Frieden, Haynes & Forbes
400 SW 8th Street, P. O. Box 639
Topeka, Kansas 66601
(913) 232-7266

David P. Batow, General Counsel
Gary W. Boyle, Senior Attorney
Jay V. Allen, Attorney
Williams Natural Gas Company
4100 One Williams Center
Tulsa, Oklahoma 74172
(918) 588-2359

Counsel for Intervenor
Williams Natural Gas Company

(3)

Supreme Court, U.S.
FILED
DEC 9 1996
CLERK

No. 96-778

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

WILLIAMS NATURAL GAS COMPANY,

Petitioner,

v.

KANSAS PIPELINE PARTNERSHIP,

Respondent,

MEMORANDUM OF RESPONDENT THE STATE CORPORATION COMMISSION OF THE STATE OF KANSAS IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

Larry Cowger
Counsel of Record
David J. Heinemann
General Counsel
Kansas Corporation Commission
1500 SW Arrowhead Road
Topeka, Kansas 66604-4027
(913) 271-3157

7 pp

No. 96-778

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

WILLIAMS NATURAL GAS COMPANY,

Petitioner,

v.

KANSAS PIPELINE PARTNERSHIP,

Respondent,

MEMORANDUM OF RESPONDENT THE STATE CORPORATION COMMISSION OF THE STATE OF KANSAS IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

Larry Cowger
Counsel of Record
David J. Heinemann
General Counsel
Kansas Corporation Commission
1500 SW Arrowhead Road
Topeka, Kansas 66604-4027
(913) 271-3157

SUPREME COURT OF THE UNITED STATES

Williams Natural Gas Company, Petitioner,	)	
v.	)	No. 96-778
Kansas Pipeline Partnership, Respondent	)	

MEMORANDUM OF RESPONDENT THE STATE CORPORATION COMMISSION OF THE STATE OF KANSAS IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

Respondent, the State Corporation Commission of the State of Kansas (KCC or Commission) files this memorandum in support of the Petition for Writ of Certiorari filed herein by the Petitioner, Williams Natural Gas Company (WNG or Williams). The KCC supports the issuance of a Writ of Certiorari to review an order of the Supreme Court of the State of Kansas denying review of an order of the Court of Appeals of the State of Kansas which held that the failure of the KCC to reach a decision of the merits of certain public utility applications within the 240-day period prescribed by Kan. Stat. Ann. § 66-117(b) denied Kansas utility ratepayers the right to have the applications considered on their merits. In support of the Petition, the KCC states as follows:

STATEMENT OF THE CASE

This matter concerns a decision by the KCC in an application filed by Kansas Pipeline Partnership (KPP) seeking KCC approval of five gas sales and transportation contracts (the contracts) with Western Resources, Inc. (WRI). After a long and arduous evidentiary proceeding all parties submitted briefs to the Commission including KPP, WNG, the KCC Staff, the Kansas Citizens' Utility Ratepayer Board (CURB), WRI, and Missouri Gas Energy (MGE). Prior to the issuance of a decision on the merits by the KCC, the Federal Energy Regulatory Commission (FERC) ordered that KPP is part of an interstate pipeline system subject to FERC's plenary jurisdiction under the Natural Gas Act.[1] This Commission held that the FERC assertion of jurisdiction constituted "an amendment to the application" to approve the contracts as that term is used in Kan. Stat. Ann. § 66-117(b) (the Statute). Using this finding as a basis, the KCC restarted the 240-day statutory decision period.[2] The KCC stayed further action on the application pending a final FERC decision concerning its jurisdiction over KPP. On appeal to the Court of Appeals of the State of Kansas (Court of Appeals), the KCC's decision was reversed and the Court of Appeals found that the contracts were "deemed approved" because the KCC failed to issue a decision on the merits within 240 days.

The KCC sought both rehearing at the Court of Appeals and review by the Kansas Supreme Court, which were

---

[1] KansOk Partnership, Kansas Pipeline Partnership, & Riverside Pipeline Co., 73 FERC ¶ 61,160 (1995).

[2] Kan.Stat.Ann. 66-117 provides that various utility filings will be "deemed approved" if the KCC fails to issue a decision within 240 days.

denied. The KCC disagrees with the Court of Appeals interpretation of its discretion to restart the 240-day decision period under Kan. Stat. Ann 66-117(b). However, the KCC does not raise any issues relating to the Court of Appeals' interpretation of the Statute because such issues do not raise important federal questions.

The KCC does support this Court's review of the Appellate Court's decision on the basis that the Statute, as applied, violates the Constitution's guarantee of due process of law by denying the right of the parties to these proceedings in particular, and utility ratepayers, in general, to an opportunity to be heard on the merits.

THE STATUTE AS APPLIED BY THE LOWER COURT VIOLATES DUE PROCESS

Under prior decisions of this Court, a Due Process Clause analysis raises two questions:

(1) Were Kansas Utility ratepayers deprived of a protected interest; and

(2) If so, what process was due?[3]

No State shall "deprive any person of life, liberty, or property, without due process of law. . . "[4] The Due

---

[3] *Burns v. United States*, 501 U.S. 129, 146-48 (1991); *Washington v. Weller Harper*, 494 U.S. 210, 228 (1990).

[4] U.S. Const. amend. XIV.

Process clause requires, "that deprivation of life, liberty, or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case".[5] Without a decision on the merits the right to notice and a hearing are rendered meaningless.[6]

Kansas law provides Kansas' utility ratepayers the right to participate in KCC proceedings and the public generally is represented in utility rate hearing by the Staff of the KCC (Staff) and also through the participation of CURB.[7] Because it is based in state law, this right is a form of property right to which due process protection must be afforded.

Logan v. Zimmerman Brush Co., 455 U.S. 422 (1981) presented a very similar statement of facts. The statute in *Logan* required an agency to hold a hearing within 120 days of the filing of a complaint. When the employment claim was dismissed solely because the agency neglected to act within the statutory time requirement, this Court held that such denial violates the Due Process Clause.[8]

---

[5] *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306,313 (1949).

[6] *Logan v. Zimmerman Brush Co.* 455 U.S. 422, 433 (1981).

[7] Kan. Stat. Ann. § 66-1223.

[8] *Logan*, 455 U.S. at 434-35. *See also, Societe Internationale v. Rogers*, 357 U.S. 197 (1958).

Several other states have similar statutes which contain comparable provisions to the Kansas Statute,[9] therefore review of the decision should be viewed as involving an important federal question.

CONCLUSION

The 240-day statutory decision period prescribed by Kan. Stat. Ann. § 66-117(b) is unconstitutional as applied to Kansas utility ratepayers in this matter by the Court of Appeals of the State of Kansas. The denial of a decision on the merits of the utility applications below denied Kansas utility ratepayers of a decision on the merits of the applications, violating the due process protections secured to them by the Fourteenth Amendment.

Respectfully submitted,

Larry Cowger
Counsel of Record
David J. Heinemann
General Counsel

Attorneys for the
State Corporation Commission
of the State of Kansas

December 9, 1996

---

[9]Minn. Stat. § 216B.16(2) (a) (1995); Mo. Ann. Stat. § 392.230(5) (Vernon 1996) (telephone); Neb. Rev. Stat. § 19-4616(7) (1996) (municipal utilities); S.C. Code Ann. § 58-5-240 (E) (Law. Co-op. 1995); Tex. Corps. & Ass'ns Code Ann. §§ 2.212(d), 3.211 (d), 5.08(d) (West 1995); Utah Code Ann. § 54-7-12 (3)(c) (1996); Vt. Stat. Ann. tit. 30, § 227(a) (1996); Wis. Stat. § 196.19(d) (1994).

Supreme Court, U.S.
FILED
DEC 19 1996
CLERK

No. 96-778

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

WILLIAMS NATURAL GAS COMPANY,
Petitioner,
v.
KANSAS PIPELINE PARTNERSHIP,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of Kansas

BRIEF IN OPPOSITION OF RESPONDENT KANSAS PIPELINE PARTNERSHIP

JAMES P. ZAKOURA
RICHARD W. HIRD
WILLIAM F. WATKINS
DAVID J. ROBERTS
SMITHYMAN & ZAKOURA, CHTD.
7300 West 110th Street
Suite 650
Overland Park, Kansas 66210
(913) 661-9800

TINO M. MONALDO
TINO M. MONALDO, CHTD.
335 North Washington
Suite 130
Hutchinson, Kansas 67501
(316) 669-9338

STANLEY M. GORINSON
Counsel of Record
JOHN LONGSTRETH
LISA M. HELPERT
PRESTON GATES ELLIS
& ROUVELAS MEEDS
1735 New York Avenue, N.W.
Suite 500
Washington, D.C. 20006
(202) 628-1700

Attorneys for Respondent Kansas Pipeline Partnership

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Does this Court have jurisdiction to hear Petitioner's claim, which was neither passed upon by, nor properly presented to, the Kansas courts?

2. Assuming this Court has jurisdiction, should it grant certiorari to consider a claim, repeatedly waived below, to correct the alleged denial of a state procedural right, when (a) the alleged right does not exist under Kansas law, (b) even if it did, long and well-established precedent of this Court establishes that Petitioner does not have the constitutionally-protected "property interest" it claims; and (c) Petitioner received far more process than was required in any event?

RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, Respondent Kansas Pipeline Partnership states that it is a general partnership and has no corporate parents or subsidiaries that have issued shares to the public.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
RULE 29.6 STATEMENT	ii
TABLE OF AUTHORITIES	v
COUNTERSTATEMENT AS TO JURISDICTION	1
COUNTERSTATEMENT OF THE CASE	1
A. The Kansas Statutory Scheme	3
B. The Proceedings in this Case	5
1. The Competitive Backdrop	5
2. The KCC's Consideration of the KPP/WRI Contracts	8
3. The Appeals to the Kansas Courts	11
SUMMARY OF REASONS FOR DENYING THE WRIT	12
REASONS FOR DENYING THE WRIT	13
I. THIS COURT DOES NOT HAVE JURISDICTION TO HEAR WNG'S PETITION	13
A. The Kansas Supreme Court Necessarily Determined that WNG Did Not Properly Present Its Constitutional Issue	14
B. WNG Waived the Constitutional Issue It Now Presents	15
II. THIS COURT DOES NOT REVIEW CLAIMS THAT STATE LAW HAS BEEN MISAPPLIED	16
III. THIS CASE DOES NOT MEET THE COURT'S PRUDENTIAL STANDARDS FOR THE GRANT OF CERTIORARI	17

TABLE OF CONTENTS—Continued

	Page
A. No Unsettled Questions of Law Are Presented	17
B. WNG Could Not Obtain Relief Even if Its Constitutional Argument Were Valid	18
1. WNG May Not Challenge Section 66-117 Because It Received Benefits under that Very Statute	18
2. If the Statute Were Declared Unconstitutional, the KCC's Suspension Authority Would be Invalidated as Well, and the KPP Contracts Would Still Be Effective	18
C. This Case May Well Be Moot by the Time this Court Could Hear It	19
IV. WNG'S DUE PROCESS CLAIM IS ABSOLUTELY WITHOUT MERIT	20
A. WNG Does Not Cite a Single Case Questioning the Constitutionality of "Deemed Approval" Statutes	20
B. WNG Had No Property Interest Protected by State Law and Recognized under the Fourteenth Amendment	20
C. Even if WNG Had a State-Created Right to a Hearing, which it Did Not, The Right Would Not Be a Protected Property Interest under the Fourteenth Amendment	23
CONCLUSION	24
APPENDIX	1a

TABLE OF AUTHORITIES

CASES

	Page
American Ry. Express v. Levee, 263 U.S. 19 (1923)	15
Archie v. City of Racine, 847 F.2d 1211 (7th Cir. 1988)	21
Beck v. Washington, 369 U.S. 541 (1962)	17
California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972)	7
Crosby v. City of Jackson, 813 F. Supp. 476 (S.D. Miss.), *aff'd mem.*, 5 F.3d 528 (5th Cir. 1993)	22
Denver Nat'l Bank v. State Comm'n of Revenue & Taxation, 279 P.2d 257 (Kan. 1955)	14
Doe v. District of Columbia, 93 F.3d 861 (D.C. Cir. 1996)	23
Fahey v. Mallonee, 332 U.S. 245 (1947)	18
Felten Truck Line v. State Bd. of Tax Appeals, 327 P.2d 836 (Kan. 1958)	19
Gagliardi v. Village of Pawling, 18 F.3d 188 (2d Cir. 1994)	23
Gryger v. Burke, 334 U.S. 728 (1948)	17
Harrison v. Long, 734 P.2d 1155 (Kan. 1987)	22
Hegeman Farms Corp. v. Baldwin, 293 U.S. 163 (1934)	22
Jacobs, Visconsi & Jacobs Co. v. City of Lawrence, 927 F.2d 1111 (10th Cir. 1991)	24
Kansas v. Coffman, 925 P.2d 419 (Kan. 1996)	14
Kansas-Nebraska Natural Gas Co. v. State Corp. Comm'n, 473 P.2d 21 (Kan. 1970)	21
KansOk Partnership v. Kansas Pipeline Operating Co., 73 Fed. Energy Reg. Comm'n Rep. (CCH) ¶ 61,293 (Dec. 8, 1995)	10
Kansas Pipeline Partnership v. State Corp. Comm'n, 916 P.2d 76 (Kan. Ct. App. 1996)	*passim*
Leavenworth-Jefferson Elec. Coop., Inc. v. Kansas Corp. Comm'n, 797 P.2d 874 (Kan. 1990)	18
Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982)	20, 21
McVay v. Rich, 874 P.2d 641 (Kan. 1994)	15
Midwest Gas Ass'n v. Kansas Corp. Comm'n, 623 P.2d 924 (Kan. Ct. App. 1981)	23

TABLE OF AUTHORITIES—Continued

	Page
In re News Publ'g Co., 743 P.2d 559 (Kan. Ct. App. 1987)	16
NLRB v. Pittsburgh S.S. Co., 340 U.S. 498 (1951)	17
Northwest Cent. Pipeline Corp. v. State Corp. Comm'n, No. 86-1801 (D. Kan. July 21, 1988)	7
Northwest Cent. Pipeline Corp. v. State Corp. Comm'n, No. 86-1801 (D. Kan. Sept. 7, 1988)	7
Northwest Cent. Pipeline Corp. v. State Corp. Comm'n, No. 85-CU-1037 (Shawnee County Dist. Ct. Oct. 17, 1988)	6
Northwest Cent. Pipeline Corp. v. State Corp. Comm'n, No. 85-C-5535 (Johnson County Dist. Ct. Oct. 18, 1988)	6
Norwegian Nitrogen Prod. Co. v. United States, 288 U.S. 294 (1933)	22
Olim v. Wakinekona, 461 U.S. 238 (1983)	23
Peoples Natural Gas Div. v. State Corp. Comm'n, 644 P.2d 999 (Kan. Ct. App. 1982)	16
Phenix Transmission Co., 32 Fed. Energy Reg. Comm'n Rep. (CCH) ¶ 61,096 (July 23, 1985)	2, 8
Pizel v. Zuspann, 803 P.2d 205 (Kan. 1990)	14
Plummer Dev., Inc. v. Prairie State Bank, 809 P.2d 1216 (Kan. 1991)	15
RR Village Ass'n v. Denver Sewer Corp., 826 F.2d 1197 (2d Cir. 1987)	22
Rice v. Sioux City Mem'l Park Cemetery, 349 U.S. 70 (1955)	19
Riverside Pipeline Co., L.P., 48 Fed. Energy Reg. Comm'n Rep. (CCH) ¶ 61,309 (Sept. 18, 1989)	7
Sellers v. Iowa Power & Light Co., 372 F. Supp. 1169 (S.D. Iowa 1974)	22
Stermbridge v. Georgia, 343 U.S. 541 (1952)	14
Street v. New York, 394 U.S. 576 (1969)	13
Thompson v. KFB Ins. Co., 850 P.2d 773 (Kan. 1993)	19
Webb v. Webb, 451 U.S. 493 (1981)	14
West Farms Assocs. v. Connecticut Traffic Comm'n, 951 F.2d 469 (2d Cir. 1991)	21
Wright v. Central Kentucky Natural Gas Co., 297 U.S. 537 (1936)	22

TABLE OF AUTHORITIES—Continued

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES	Page
Sup. Ct. R. 10	20
28 U.S.C. § 1257	1, 15
Kan. Sup. Ct. R. 8.03(e)(1)	15
Kan. Sup. Ct. R. 9.02	5
Kan. Stat. Ann. § 60-2102(a)(4)	16
Kan. Stat. Ann. § 60-2103(h)	16
Kan. Stat. Ann. § 66-117	*passim*
Kan. Stat. Ann. § 66-117(b)	*passim*
Kan. Stat. Ann. § 66-118a(b)	5
Kan. Stat. Ann. § 66-118b	16
Kan. Stat. Ann. § 66-118g	5
Kan. Stat. Ann. § 66-118h	5
Kan. Stat. Ann. § 77-523(b)	21
Kan. Admin. Reg. § 82-1-204(i)	21
Kan. Admin. Reg. § 82-1-225(c)	21
OTHER AUTHORITY	
59 Am. Jur. 2d., *Parties*, § 129	21

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-778

WILLIAMS NATURAL GAS COMPANY,
Petitioner,

v.

KANSAS PIPELINE PARTNERSHIP,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of Kansas

---

BRIEF IN OPPOSITION OF RESPONDENT KANSAS PIPELINE PARTNERSHIP

Respondent Kansas Pipeline Partnership ("KPP") respectfully submits this brief in opposition to the petition filed by Williams Natural Gas Company ("WNG") for a writ of certiorari to review a decision of the Supreme Court of the State of Kansas. The decision is unreported and reprinted as Appendix A to WNG's Petition.

COUNTERSTATEMENT AS TO JURISDICTION

This Court lacks jurisdiction over the Petition under 28 U.S.C. § 1257, the statute invoked by Petitioner WNG, because the question WNG presents was neither passed on nor properly presented to the Kansas courts. The Petition also seeks a writ directed to the wrong court.

COUNTERSTATEMENT OF THE CASE

Kansas, like a number of other states, has established a statutory procedure for the filing and approval of utility

rates. That procedure is designed to protect against "regulatory lag"—undue delays in the regulatory process caused by, among other things, competitors seeking to turn the regulatory process to their own advantage. Kan. Stat. Ann. § 66-117 grants the Kansas Corporation Commission ("Commission" or "KCC") the power to suspend the effectiveness of proposed utility rates or contracts, but strictly limits that power by providing a maximum period of suspension. Proposed changes are "deemed approved" if the Commission fails to decide the matter within that period. The Kansas legislature expressly refused to give the KCC the power to order open-ended or indefinite suspensions. Kansas law also provides for expedited appeals of KCC orders.

In March 1995, KPP filed five proposed natural gas contracts with the KCC pursuant to § 66-117. Timely approval of the contracts was critical to KPP, as the contracts contained deadlines for performance and required significant facilities construction. After extensive delays, many caused by WNG, and a comprehensive hearing in which WNG participated fully, the KCC declined to rule within the statutory period. Although the KCC (which opposed enactment of § 66-117) refused to treat the contracts as deemed approved, its action was reversed on appeal and the contracts finally were found to have become effective.

WNG then filed an untimely constitutional challenge to the statute, a challenge WNG concedes the Kansas courts did not consider. WNG Pet. at 4. There is no support in the decisions of this Court for WNG's constitutional claim. Indeed, the wisdom of the Kansas statute is demonstrated by WNG's history of bringing abusive litigation against KPP to protect its monopoly, leading a federal agency to conclude that WNG had "used incongruous positions, ill-defined 'questions' and innuendo . . . in an apparent effort to eliminate competition from a new intrastate pipeline." *Phenix Transmission Co.*, 32 Fed. Energy

Reg. Comm'n Rep. (CCH) ¶ 61,096, at 61,264 (July 23, 1985).[1]

A. The Kansas Statutory Scheme

Kansas requires a utility or common carrier to file with the KCC any changes to the rates, charges, rules or practices pertaining to its service at least thirty days before they become effective. After filing,

> the commission, either upon complaint or on its own motion, *may* give notice and hold a hearing upon such proposed changes. Pending such hearing, the commission *may* suspend the operation of such schedule and defer the effective date of such change . . .[2]

The statute plainly states that the KCC is not required to hold a hearing or to suspend the proposed changes. The KCC's suspension power is also expressly qualified to assure its timely action on utility rate filings:

> The commission shall not delay the effective date of the proposed change . . . more than 240 days beyond the date the public utility or common carrier filed its application requesting the proposed change.[3]

The statute enforces this limitation by providing, subject to certain exceptions not applicable here, that if no final order issues within the 240 day period "the schedule shall be *deemed approved* by the commission and the proposed change shall be effective immediately . . . ." Kan. Stat. Ann. § 66-117(b) (emphasis supplied).

The Kansas Court of Appeals reviewed below the legislative history of the statute and confirmed that its purpose "was to adopt time limits to remedy delays utilities had

---

[1] KPP is a successor to Phenix. *See* note 8, *infra*.

[2] Kan. Stat. Ann. § 66-117(b) (emphasis supplied). The statute is at App. H to WNG's Petition.

[3] *Id.*

experienced with the KCC." *Kansas Pipeline Partnership v. State Corp. Comm'n*, 916 P.2d 76, 83 (Kan. Ct. App. 1996). When it enacted the statute in 1980, the legislature had before it evidence concerning the harms of "regulatory lag." The Kansas Court of Appeals found that "the legislature was intent on forcing the KCC to act within prescribed time limits." *Id.* at 85.[4] Although the court recognized that a "deemed approval" could moot many hours of staff work and legal and technical analysis expended in connection with a hearing, it found that the

> legislative history makes clear that was *precisely an anticipated result* should the KCC fail to make a final decision within the time limits provided by [Kan. Stat. Ann.] 66-117(b).[5]

WNG argues to this Court that Kansas law gave it a right to a hearing, WNG Pet. at 5, 7-8, but the statutory language expressly provides that hearings are discretionary. WNG also argues that it had a "right to a determination on the merits," *id.*, but, as the Court of Appeals noted, the KCC's failure to make such a determination is "precisely an anticipated result" of the Kansas statute.

Since the statute allows the FCC to suspend rates in its discretion, that suspension cannot be unlimited. A 240-day period was the reasonable balance struck by the legislature.[6] Kansas' expedited appeals process for utility rate

---

[4] The KCC strongly opposed any "absolute time limits," but never suggested they were unconstitutional. Like many decision-makers, the KCC preferred to have no time limits imposed on it, but the legislature rejected the KCC's position. The KCC has filed in support of WNG's Petition, seeking to accomplish here what it could not accomplish in the Kansas legislature. The KCC's brief filing adds nothing whatsoever to WNG's Petition.

[5] 916 P.2d at 85 (emphasis supplied).

[6] The Court of Appeals noted that some proposed versions of the legislation that became § 66-117 provided a shorter 180-day period. *Id.* at 83. In extending the period to 240 days, the Kansas House Ways & Means Committee expressly rejected a proposal

matters further demonstrates its interest in protecting utilities from regulatory delays.[7]

The Kansas procedure is not unusual. The Court of Appeals opinion noted testimony before the Kansas legislature that "time limits were not new and had been adopted by numerous regulatory agencies across the country." 916 P.2d at 83. WNG's own Petition cites numerous similar state statutes. WNG Pet. at 15-18. Nonetheless, the Petition fails to cite a single decision holding, or even suggesting, that such a "deemed approval" statute raises any constitutional problems. WNG thus asks that this Court, contrary to its practice and to common sense, reach out to unsettle currently settled, and indeed long-settled and noncontroversial, law.

B. The Proceedings in this Case

1. *The Competitive Backdrop*

KPP is a Commission-certificated natural gas pipeline which sells and transports natural gas delivered in Kansas City, Wichita, and other cities in Kansas.[8] The KPP contracts at issue were with Western Resources, Inc. ("WRI"),

---

that would have "given the KCC more flexibility in deciding cases under the new time limits." *Id.* at 85.

[7] Appeals are taken directly to the Kansas Court of Appeals, bypassing district court review. Kan. Stat. Ann. § 66-118a(b). Under Kan. Sup. Ct. R. 9.02, the appeals court has 120 days to issue a final order. If the court of appeals does not act, the utility may collect the full amount of the rates sought, subject to a bonding requirement with respect to rates disapproved by the KCC. Kan. Stat. Ann. §§ 66-118g, 118h. Only the utility may waive the 120-day time limit. Kan. Sup. Ct. R. 9.02.

[8] KPP is the successor to Kansas Pipeline Company, L.P. ("KPCLP") which was certificated as a public utility by the KCC in 1985. In 1995, the operations of Kansas Natural Partnership, a KPP affiliate and successor to Phenix Transmission Company ("Phenix"), were combined into KPP's operations. References to KPP and WNG herein include, as appropriate, their predcessor entities.

which distributes natural gas to virtually the entire Kansas retail market.

At the time KPP's applications were filed, approximately 90% of the natural gas used in northeastern Kansas was supplied by Petitioner WNG, the largest interstate pipeline in the country. (6 Rec. 178.)[9] Until KPP's certification in 1985, WNG had been for many years the sole supplier of natural gas for distribution in metropolitan Kansas City and most other areas of Kansas. (8 Rec. 193-94.) Under the KPP/WRI contracts, the share of natural gas in eastern Kansas supplied by KPP would rise from about 10% to about 30%. (6 Rec. 185; 8 Rec. 194.)

WNG's Petition to this Court is merely the latest episode in a pattern of litigation brought by WNG over the past decade to stifle KPP's competitive entry into markets WNG dominates. (*See* 8 Rec. 215-17.) Although WNG describes its interest in this matter as that of "an interested competitor of KPP," WNG Pet. at 7, WNG is not a party to the contracts at issue; nor does it supply, purchase, or transport the natural gas to be sold under the contracts. WNG's interest is solely to protect itself against any competitive threat to its monopoly. WNG has often benefited from the delay and the chilling effects engendered by its use of proceedings to stifle competition from KPP, the very problem the Kansas statute at issue addresses.

For example, WNG opposed the KCC's certifications of KPP's predecessor companies (KPCLP and Phenix), then left its appeals of these decisions open for nearly three years but declined to prosecute them, keeping KPP's certificates under a legal cloud.[10] WNG also filed meritless

---

[9] Citations are to the record filed with the Kansas Court of Appeals.

[10] *Northwest Cent. Pipeline Corp. v. State Corp. Comm'n*, No. 85-C-5535 (Johnson County Dist. Ct. Oct. 18, 1988); *Northwest Cent. Pipeline Corp. v. State Corp. Comm'n*, No. 85-CU-1037 (Shawnee County Dist. Ct. Oct. 17, 1988).

and protracted litigation to prevent KPP from selling gas to WRI's predecessor, allowing the litigation to languish so long that the federal court, "weary of delay, wary of the potential for misuse of litigation, and desirous of achieving some progress in the case," [11] dismissed it for lack of prosecution.[12] During this period WRI repeatedly refused to deal with KPP, citing the threat of litigation from WNG.[13]

WNG also litigated extensively at the Federal Energy Regulatory Commission ("FERC") to disrupt KPP's operations, seeking disapproval of rate applications and denial of Natural Gas Act ("NGA") applications to provide interstate pipeline service. In one of the NGA matter, FERC noted that "[t]he harm WNG complains of, if it occurs at all, will be the result of competition in the transportation market . . . . We see no reason to shield an interstate pipeline, such as WNG, from similar competition." *Riverside Pipeline Co., L.P.*, 48 Fed. Energy Reg. Comm'n Rep. (CCH) ¶ 61,309, at 62,016 (Sept. 18, 1989).

In both NGA matters, FERC denied WNG's requests for an evidentiary hearing. Moreover, in the rate case FERC rebuked at length the anticompetitive misuse of the litigation process by WNG (then known as Northwest Central):

> Although the Commission encourages participation by interested parties in proceedings to establish rates of intrastate pipelines, *it looks with disfavor on Northwest Central's apparent strategy in this proceeding to bar Phenix's entry into the NGPA section 311*

---

[11] *Northwest Cent. Pipeline Corp. v. State Corp. Comm'n*, No. 86-1801 (D. Kan. July 21, 1988) (order to show cause) at 4.

[12] *Northwest Cent. Pipeline Corp. v. Corp. Comm'n*, No. 86-1801 (D. Kan. Sept. 7, 1988) (order dismissing complaint).

[13] This Court has recognized that sham litigation can be used for anticompetitive purposes. *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972).

> *market as a potential competitor.* Far from aiding the Commission's determination of fair and equitable rates, Northwest Central has used incongruous positions, ill-defined "questions," and innuendo as attempts to persuade us to disapprove Phenix's rate. Simply put, Northwest Central has not proposed a different rate or appropriate rate methodologies; it has tried only to negate Phenix's presentation *in an apparent effort to eliminate competition from a new intrastate pipeline.*[14]

2. *The KCC's Consideration of the KPP/WRI Contracts*

The KPP/WRI contracts are time-sensitive, as they contain strict deadlines and provide they will become null and void if KPP does not give the required notices to commence performance in a timely manner. (1 Rec. 1, 18, 36, 54, 69-70.) Moreover, KPP must construct extensive facilities. (*See* 1 Rec. 70-71.) The Commission's delay in approving the contracts has cost KPP millions of dollars. (1 Rec. 72, 75.)

In April, 1995, the KCC issued Suspension Orders under Kan. Stat. Ann. § 66-117 suspending the effectiveness of the contracts until September 27, 1995 so the KCC could conduct a "full investigation of this matter, which may result in a hearing." (1 Rec. 143a, 143c.)[15] WNG had already filed a Petition to Intervene, stating its "direct interest" in its entirety as follows:

> Because of the nature of the business conducted by WNG and the affect [sic] this proposal may have in the industry, WNG has a direct interest in these proceedings and may be adversely affected by any order of this Commission. (1 Rec. 117.)

---

[14] 32 Fed. Energy Reg. Comm'n Rep. (CCH) at 61,263-64 (emphasis supplied).

[15] WNG and WRI had entered into a 20-year contract for volumes many times greater than the volumes in the KPP/WRI contracts; yet the KCC required no hearing. (1 Rec. 193.)

WNG's Petition did not allege anything other than a generalized interest in the proceeding. WNG was allowed to intervene without making any specific showing. WNG had actual notice that KPP and the KCC were treating the applications as governed by Kan. Stat. Ann. § 66-117,[16] the only statute that provided the KCC with authority to suspend the contracts.[17]

In an action that KPP noted "appears to be totally unprecedented in the history of the state of Kansas" (1 Rec. 192), the KCC set the applications for hearing. KPP repeatedly informed the KCC that delays were causing KPP unreasonable and undue hardship, and irreparable harm, due to the time-sentitive nature of the contracts. (1 Rec. 195, 347; 2 Rec. 32-33, 113, 138, 212; 4 Rec. 173, 197-98; 27 Rec. 14, 18-20, 175-76.) Nonetheless, the KCC repeatedly delayed the hearing, which, as a result, did not begin until August 21, 1995. (2 Rec. 169; 5 Rec. 7-9.)

WNG also repeatedly sought to delay the proceedings, asking for hearing postponements to dates in September and October of 1995. (1 Rec. 287; 4 Rec. 165.) It moved to vacate the procedural schedule completely (1 Rec. 284), and to stay the proceedings indefinitely on the ground that FERC might, in response to a motion filed by WNG, assert jurisdiction over the contracts at issue. (1 Rec. 298-99.) WNG also moved the KCC at least twice to dismiss the applications outright. (1 Rec. 310; 27 Rec. 60.)

WNG participated fully in the KCC hearing, which lasted over two weeks. WNG called seven witnesses and

---

[16] For example, WNG noted in a pleading filed May 30, 1995, that "KPP states that it has filed these contracts under Kan. Stat. Ann. 66-117" (1 Rec. 282), and discussed the statute's requirements at length.

[17] At oral argument before the Kansas Court of Appeals, the KCC "acknowledged that 66-117 is the only statute permitting suspension of an effective date . . . ." 916 P.2d at 81.

had the opportunity to cross examine all other witnesses. Although WNG has asserted to this Court that the KCC would not have approved the contracts had it issued a decision, WNG Pet. at 13, nothing in the record supports WNG's speculation as to how the KCC would have ruled. KPP presented abundant evidence to support a KCC finding that the contracts would advance competition and decrease costs to ratepayers.[18]

Post hearing briefing was concluded October 6, 1995. The 240-day period established by Kan. Stat. Ann. § 66-117 expired November 29, 1995, nearly two months after the hearing was closed. In enacting § 66-117 the legislature evidenced its belief that 20 days was sufficient time after the conclusion of a hearing for the KCC to issue a decision; the KCC in fact had 53 days.[19]

Nonetheless, the KCC issued no decision. Rather, it first temporarily, then indefinitely, stayed the proceeding on the basis of a November 2, 1995 FERC order asserting that KPP was an interstate pipeline subject to FERC jurisdiction, an order issued in part at WNG's request. The KCC declined to act even after FERC stayed its order and confirmed that KPP remained subject to KCC regulation of is rates and services "until the effectiveness of . . . [FERC's] assertion of jurisdiction . . . ." *KansOk Partner-*

[18] For example, KPP demonstrated that (1) under three of the contracts at issue services would be priced at the *lower of* WNG's equivalent rate or KPP's existing KCC-approved cost of service based rate (1 Rec. 15-17, 32-35, 50-53, 152-6, 152-10; 11 Rec. 2643-6, 2643-8); (2) the already-existing contract would continue at KCC-approved rates for 5 years and then drop to the lower of those rates or the WNG price (1 Rec. 152-7; 11 Rec. 2643-9 to 2643-10), and (3) the remaining contract provided a flat rate consistent with KPP's KCC-approved terms and conditions (1 Rec. 152-38), and less expensive than the existing (WNG) alternative. (7 Rec. 259, 263-64, 270-75, 306, 326; 26 Rec. 47-52.)

[19] Section 66-117 provides that for hearings ongoing at the end of the 240-day period, the period may be extended to 20 days after the end of the hearing.

ship v. Kansas Pipeline Operating Co., 73 Fed. Energy Reg. Comm'n Rep. (CCH) ¶ 61,293, at 61,817 (Dec. 8, 1995).[20]

In challenging the KCC stay, KPP expressly noted that the KCC was required by § 66-117 to enter a final order by November 29, 1995 "or the contracts will be deemed approved." (27 Rec. 13.) KPP again advised the KCC of the time-sensitive nature of the contracts. (27 Rec. 18-19.) WNG expressly acknowledged the "potential risk that the subject contracts might be 'deemed approved' by operation of law if the Commission does not issue a final order on the pending applications before expiration of the 240-day period prescribed by K.S.A. 66-117(b)." (27 Rec. 4.) To eliminate the "unpalatable possibility that the proposed contracts may become effective by operation of law after November 27 [sic], 1995," WNG urged the KCC to dismiss the applications or to decide them on the merits. (27 Rec. 60.) At no time did WNG argue to the KCC that application of the deemed approval provisions of § 66-117 would be unconstitutional, even though the statute's application was squarely at issue before the KCC and WNG was well aware of its consequences.

3. *The Appeals to the Kansas Courts*

After unsuccessfully moving for reconsideration of the KCC's stay order, which was considered a final order by the Kansas courts, KPP appealed on the ground that the contracts should have been "deemed approved" under Kan. Stat. Ann. § 66-117. WNG intervened in the appeal, but did not assert on brief that § 66-117 was unconstitutional, or that application of the "deemed approval" provisions of the statute would violate WNG's rights under the Due Process Clause. Nor did WNG file a cross-appeal

---

[20] FERC has still not assumed jurisdiction over KPP, although a decision on KPP's petition for rehearing is expected shortly.

raising its constitutional claims, or preserving any claims with respect to the conduct of the KCC hearing itself.

The Kansas Court of Appeals reversed the Commission. The court held that the "legislature was intent on forcing the KCC to act within the prescribed time limits," 916 P.2d at 85, and that the KCC's failure to issue a final order within the 240-day period required that the contracts be deemed approved by operation of law. The court rejected the KCC's contention that the 240-day period was properly restarted, finding that "under the peculiar facts of this case," KCC was precluded from restarting the clock by the undisputed "failure of anyone to file an amendment to the application." *Id.* at 84-85.

WNG moved for rehearing en banc before the Kansas Court of Appeals, raising for the first time the assertion that Kan. Stat. Ann. § 66-117 was unconstitutional. The motion was denied without opinion. *See* App. A. WNG then petitioned the Supreme Court of Kansas for review; that petition was also denied without opinion. WNG Pet. App. A.

SUMMARY OF REASONS FOR DENYING THE WRIT

This Court lacks jurisdiction to decide whether Kan. Stat. Ann. § 66-117 is unconstitutional because WNG repeatedly failed to present the issue properly for consideration by the Kansas courts. In any event, WNG, which benefited from the statute and thus cannot be heard to challenge it, has wholly failed to show "compelling reasons" for this Court to take the case. WNG seeks a ruling that its procedural rights under Kansas law were violated when KPP's contracts were deemed approved by operation of law without a "determination on the merits." This Court has consistently refused to hear claims that allege misapplication of state law. Nor does WNG even attempt to identify any unsettled issue of law or conflict among the lower courts concerning such "deemed ap-

proval" provisions, which many states have adopted. WNG cites no case even questioning the constitutionality of such statutes. Moreover, since FERC has recently announced it may assert jurisdiction over the KPP contracts at issue, the matter could soon well be moot.

WNG's "due process" claim is without merit. Under Kansas law, WNG had no right to a hearing or a "decision on the merits." WNG merely had a procedural privilege to intervene, which Kansas liberally grants and can limit at any time. Moreover, under long-established precedent of this Court, no constitutionally-protected interest of WNG was implicated. WNG had no protected property interest in the rates to be charged under KPP's contracts or in its "right to intervene" in the Kansas proceeding. Nonetheless, WNG participated at length in the hearing and did its best to delay any conclusion to the matter. Its Petition should be denied.

REASONS FOR DENYING THE WRIT

I. THIS COURT DOES NOT HAVE JURISDICTION TO HEAR WNG'S PETITION

This Court does not have jurisdiction to review the constitutional issue raised in WNG's Petition because it was not properly raised in, or passed upon by, the Kansas courts. WNG concedes that it first raised this constitutional challenge in its Petition for Rehearing to the Kansas Court of Appeals, and that the Kansas courts did not address the constitutional argument. WNG Pet. at 4.

WNG bears the burden of showing that it properly raised the constitutional issue below. When "the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this court can affirmatively show the contrary." *Street v. New York*, 394 U.S. 576, 582 (1969). WNG must show that the Kansas courts "were apprised of

the nature or substance of the federal claim at the time and in the manner required by the state law." *Webb v. Webb*, 451 U.S. 493, 501 (1981).

WNG has not met, and cannot meet, that burden. The Kansas Supreme Court will not review a constitutional challenge if the issue was not raised below or briefed as an issue on appeal, following a "long-time rule that when constitutional grounds are asserted for the first time on appeal, they are not properly before us for review." *Kansas v. Coffman*, 925 P.2d 419, 421 (Kan. 1996). The Kansas Supreme Court also will not consider issues raised for the first time in motions for rehearing.[21]

In *Stembridge v. Georgia*, 343 U.S. 541 (1952), this Court declined to review a constitutional claim because, contrary to the requirements of state law, the issue was raised for the first time in a petition for rehearing addressed to the state intermediate appellate court. The later refusal by the state's highest court, without opinion, to hear the case precluded review by this Court because it was "apparent from the record that the Supreme Court of Georgia took no action upon the question of federal constitutional rights raised for the first time on the motion for rehearing in the Court of Appeals." *Id.* at 547. Review of WNG's Petition is likewise precluded.

A. The Kansas Supreme Court Necessarily Determined that WNG Did Not Properly Present Its Constitutional Issue

WNG sought review in the Kansas Supreme Court as a matter of right, claiming that the Court of Appeals' decision violated its constitutional rights. WNG Pet. App.

---

[21] *See Pizel v. Zuspann*, 803 P.2d 205 (Kan. 1990) (declining to consider issue raised for the first time on motion for rehearing); *Denver Nat'l Bank v. State Comm'n of Revenue & Taxation*, 279 P.2d 257, 260-61 (Kan. 1955) (same).

I at 3-4. In denying the appeal,[22] the Kansas Supreme Court necessarily determined that the constitutional issue did not arise for the first time as a result of the Court of Appeals' decision, and should have been raised earlier.[23]

WNG had numerous opportunities to raise its constitutional challenges earlier. The "deemed approved" provision of § 66-117(b) was squarely at issue before the KCC no later than November 14, 1995, when KPP asserted that its requests would be deemed approved if a final decision were not issued by November 29, 1995. The Kansas Court of Appeals defined the "core question" before it as whether the KPP/WRI contracts were "deemed approved" by operation of law, 916 P.2d at 81, but WNG's appeal brief raised no constitutional problem with the statute.[24] WNG did not raise its constitutional claim until rehearing, the kind of tactic the Kansas Supreme Court has stated "smacks of trial by ambush." *McVay v. Rich*, 874 P.2d 641, 647 (Kan. 1994).

B. WNG Waived the Constitutional Issue It Now Presents

Kansas expressly provides that only those issues presented to the KCC in an application for a rehearing may

---

[22] Because the Kansas Supreme Court's denial of WNG's petition for review was discretionary, WNG's Petition for Certiorari should have sought a writ directed to the Kansas Court of Appeals. *American Ry. Express Co. v. Levee*, 263 U.S. 19, 20-21 (1923) (intermediate court of appeals is "highest court of the State" under 28 U.S.C. § 1257 if state supreme court denies discretionary review).

[23] Kan. Sup. Ct. R. 8.03(e)(1) provides in relevant part that "any party may appeal as a matter of right from a final decision of the Court of Appeals in any case in which a question under the Constitution of either the United States or the State of Kansas arises for the first time as a result of the decision of the Court of Appeals."

[24] *See Plummer Dev., Inc. v. Prairie State Bank*, 809 P.2d 1216 (Kan. 1991) (issues not briefed are waived or abandoned).

be relied upon in a later court proceeding.[25] WNG's so-called constitutional issue was not raised in a petition for rehearing to the KCC and so was not properly before the Kansas courts. *See Peoples Natural Gas Div. v. State Corp. Comm'n*, 644 P.2d 999 (Kan. Ct. App. 1982) (statute mandates that issues subject to judicial review must be found in specific allegations set forth in an application for rehearing). It is thus not properly before this Court.

Moreover, WNG waived its appeal of the constitutional issue because it failed to preserve it through a notice of cross-appeal to the Kansas Court of Appeals. That court held such a cross-appeal required in *In re News Publishing Co.*, 743 P.2d 559 (Kan. Ct. App. 1987), an appeal from an agency decision in favor of a taxpayer. Although it affirmed the agency, the court of appeals declined to address the taxpayer's constitutional claim because the taxpayer had "filed no notice of cross-appeal to preserve the issue . . . for decision by this court." *Id.* at 563.[26]

II. THIS COURT DOES NOT REVIEW CLAIMS THAT STATE LAW HAS BEEN MISAPPLIED

Although WNG attempts to dress its claim in constitutional clothing, its real complaint is that state procedures

---

[25] Kan. Stat. Ann. § 66-118b ("No cause of action arising out of any order or decision of the commission shall accrue in any court to any party unless such party shall petition for reconsideration . . . . *No party shall, in any court, urge or rely upon any ground not set forth in the petition.*") (emphasis supplied).

[26] WNG also raises the odd argument that the "deemed approval" statute removed its right to appeal the KCC's denial of its motion to dismiss the applications. WNG Pet. at 12. But WNG never even attempted to file such an appeal, and thus waived it. *See* Kan. Stat. Ann. §§ 60-2102(a)(4), 60-2103(h) (appellee desiring review of any act or ruling from the beginning of the proceeding must file a notice of cross-appeal within twenty days of service of the notice of appeal). WNG may not now criticize the statute for "depriving" it of an appeal it waived by its own actions.

were not applied so as to derail KPP's applications. Indeed, WNG expressly asserts that the state law was misapplied, WNG Pet. at 3, 4 n.4, and alleges the statute is unconstitutional "as applied." *Id.* at 4. Whatever that argument may mean, this Court has always rejected claims that mere deprivations of state procedural rights (even those that could be identified), violate the Fourteenth Amendment:

> We have said time and again that the Fourteenth Amendment does not "assure uniformity of judicial decisions [or] immunity from judicial error." Were it otherwise, every alleged misapplication of state law would constitute a federal constitutional question.[27]

Were this Court to accept WNG's theory that some amorphous procedural right constitutes a "property" interest because it allegedly is state-created, WNG Pet. at 7, the Court would be required to hear, as a constitutional matter, a host of claims regarding every alleged denial of a state procedural "right". This Court has consistently resisted such wholesale intrusions into state affairs. *See Gryger v. Burke*, 334 U.S. 728, 731 (1948) ("mere error of state law" not a denial of due process).

III. THIS CASE DOES NOT MEET THE COURT'S PRUDENTIAL STANDARDS FOR THE GRANT OF CERTIORARI

A. No Unsettled Questions of Law Are Presented

In many of the cases in which this Court grants certiorari "there is a real and embarrassing conflict of opinion and authority" in the lower courts. *See NLRB v. Pittsburgh S.S. Co.*, 340 U.S. 498, 502 (1951). WNG identifies no split of authority in the lower courts; nor does its Petition give any other indication that it presents a substantial federal constitutional question. This Court has

---

[27] *Beck v. Washington*, 369 U.S. 541, 554-55 (1962) (citations omitted).

no need to provide "guidance" in this case to resolve unsettled issues of law. To the contrary, long-standing and well-established precedent easily disposes of WNG's claim.

B. WNG Could Not Obtain Relief Even if Its Constitutional Argument Were Valid

1. *WNG May Not Challenge Section 66-117 Because It Received Benefits under that Very Statute*

It is well-settled that one who voluntarily proceeds under a statute and claims benefits conferred by it will not be heard to question its constitutionality in order to avoid its burdens. *Fahey v. Mallonee*, 322 U.S. 245, 255 (1947). *Accord, Leavenworth-Jefferson Elec. Coop., Inc. v. Kansas Corp. Comm'n*, 797 P.2d 874, 878 (Kan. 1990). *Leavenworth* held that a utility was not entitled to challenge a statute as unconstitutional because it had "acquiesced in the acknowledgment, use, and benefit of . . . the statute it question[ed]" by seeking compensation under the same statute. *Id.* at 877. WNG likewise benefited from the statute it now claims is unconstitutional. WNG has submitted numerous pleadings under the authority of the statute seeking delay or dismissal of KPP's applications. In addition, the statute was the basis on which the KCC acted to suspend KPP's contracts, an action WNG urged, and to hold a hearing in which WNG participated fully. WNG may not now be heard to complain that the statute is unconstitutional.

2. *If the Statute Were Declared Unconstitutional, the KCC's Suspension Authority Would be Invalidated as Well, and the KPP Contracts Would Still Be Effective*

As the KCC itself conceded before the Court of Appeals, *see* n.17, *supra*, § 66-117 was the sole source of the KCC's suspension authority. The deemed approval provision of

that statute which WNG now seeks to invalidate is an integral part of that authority. Under Kansas law, where valid and invalid provisions are not separate and independent of each other, but are "so connected and intertwined" that the invalid portion cannot be severed without violating the intent of the legislature, the entire Act must fail. *Thompson v. KFB Ins. Co.*, 850 P.2d 773 (Kan. 1993). A portion of an act can be stricken only " 'if it can be said that the Act would have been passed without the objectionable portion and if the statute would operate effectively to carry out the intention of the legislature with such portion stricken . . . .' " *Id.* at 782 (*quoting Felten Truck Line v. State Bd. of Tax Appeals*, 327 P.2d 836 (Kan. 1958)).

Since the Kansas legislature made absolutely clear its intent to grant suspension authority *only* subject to strict time limits enforced by the "deemed approval" provision, if the deemed approval provision were declared unconstitutional, the suspension authority should fall with it. Otherwise, the legislature's intent would be thwarted. WNG would thus obtain no relief; the contracts would remain in effect.

C. This Case May Well Be Moot by the Time this Court Could Hear It

This Court reviews issues that are "beyond the academic or the episodic." *Rice v. Sioux City Mem'l Park Cemetery*, 349 U.S. 70, 74 (1955). The pending FERC proceeding, which could result in the near future in a confirmation that the KPP contracts at issue are subject to federal jurisdiction and not to the Kansas statutory scheme, threatens to make this entire dispute academic at any time. Indeed, since WNG's Petition was filed, this case has already become moot as to one of the five contracts at issue, which is freely assignable and has been sold to a FERC-regulated pipeline company. WNG's claim that this case presents an issue of "great importance to Kansas

consumers," WNG Pet. at 13, is thus quite misleading. WNG has not shown why this Court's scarce resources should be allocated to this matter. *See* Sup. Ct. R. 10 (certiorari granted only for "compelling reasons").

IV. WNG'S DUE PROCESS CLAIM IS ABSOLUTELY WITHOUT MERIT

A. WNG Does Not Cite a Single Case Questioning the Constitutionality of "Deemed Approval" Statutes

Perhaps the best indication of the lack of merit in its Petition is WNG's failure to cite a single case invalidating, or even questioning, the type of deemed approval statute it challenges. WNG concedes that many states have similar provisions, and some have taken slightly different approaches. WNG Pet. at 15-17. The Petition discloses no instance of any such statute struck down on constitutional grounds. Simply put, WNG provides no reason why in this area, like others, states should not be free to establish their own procedures balancing the interests of utilities, ratepayers and others.

B. WNG Had No Property Interest Protected by State Law and Recognized under the Fourteenth Amendment

WNG argues that because its "right" to intervene in the KCC hearing was "grounded in state law, this right is a form of 'property' right to which due process protection must be given." WNG Pet. at 7. WNG must do more than simply assert it has some "right" under state law; it must show that it has an "individual entitlement" that the Fourteenth Amendment protects. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430 (1982). WNG was granted its intervenor status based on general allegations concerning the "nature of its business" and the "affect [sic] . . . in the industry;" no "individual entitlement" was required or recognized. Indeed, KCC regulations expressly

negate WNG's argument that its intervenor status represented a recognition by the state that WNG had any "entitlement" or "property" interest:

> "Intervenor" means any person petitioning to intervene as provided by [Kan. Admin. Reg.] 82-1-225, when admitted by the commission as a participant in any proceeding. *Admission as an intervenor shall not be construed as recognition by the commission that the intervenor might be aggrieved by any order of the commission in the proceeding.*[28]

The power to grant intervention "enables the Commission to pursue a commendable liberal policy in permitting participation by parties desiring to intervene in commission proceedings." *Kansas-Nebraska Natural Gas Co. v. State Corp. Comm'n*, 473 P.2d 21, 30 (Kan. 1970). However, the intervenor's participation can be limited by the presiding officer "either at the time that intervention is granted *or at any subsequent time*." Kan. Admin. Reg. § 82-1-225(c) (emphasis supplied).

A procedural privilege that is liberally granted absent any showing of individual entitlement, and that can be subsequently limited at any time, is the very antithesis of a "property right."[29] Yet that is all that WNG had.[30]

---

[28] Kan. Admin. Reg. § 82-1-204(i) (emphasis supplied). *See* 59 Am. Jur. 2d., *Parties*, § 129, at 583 (1987) ("A statute or rule relating to intervention is purely procedural and does not create substantive rights.") *See also* Kan. Stat. Ann. § 77-523(b) (Kansas Administrative Procedure Act provision allowing restriction of an intervenor's right to participate in an administrative hearing.)

[29] *See West Farms Assocs. v. Connecticut Traffic Comm'n*, 951 F.2d 469, 472-73 (2d Cir. 1991) (competitor's right to intervene in state proceeding does not create the "individual entitlement" necessary for a protected property interest); *Archie v. City of Racine*, 847 F.2d 1211, 1217 (7th Cir. 1988) (*en banc*) ("[I]f state law establishes procedural entitlements, these are not themselves property and will not be enforced in the name of the Constitution.")

[30] *Logan v. Zimmerman Brush* provides no support for WNG's claims. *Logan* involved a plaintiff deprived of his own cause of

A long and unbroken line of cases from the state and federal courts holds that parties other than the utility itself have no property interest, and hence no right to a hearing or other due process, with respect to the utility's rates.[31] In *Harrison v. Long*, 734 P.2d 1155 (Kan. 1987), the Kansas Supreme Court confirmed that Kansas follows this long line of authority: "Interests which have been held not to be protected by the due process clause include . . . utility rates . . . ." *Id.* at 1159.[32] Thus, not only has WNG failed to cite any authority supporting its position, well-settled precedent squarely rejects it.

---

action; WNG has no cause of action, and merely invoked a procedure to intervene in KPP's action. Logan also involved an employee's right to be free from discrimination involving his job; WNG has no right to be free from competition. *See Hegeman Farms Corp. v. Baldwin*, 293 U.S. 163, 170 (1934) ("The Fourteenth Amendment does not protect a business against the hazards of competition.") Finally, while Logan had no opportunity to be heard, WNG was heard at length.

[31] *See, e.g., Wright v. Central Kentucky Natural Gas Co.*, 297 U.S. 537, 542 (1936) (natural gas customers have no vested rights in rates set by agreement between city and utility); *Norwegian Nitrogen Prod. Co. v. United States*, 288 U.S. 294, 318 (1933) ("No one has a legal right to the maintenance of an existing rate or duty."); *RR Village Ass'n v. Denver Sewer Corp.*, 826 F.2d 1197, 1202 (2d Cir. 1987) ("[T]he New York courts have repeatedly held that state law creates no property interest in rates to be paid for services to be provided in the future, even where, as here, a statute or regulation requires that such rates be reasonable."); *Crosby v. City of Jackson*, 813 F. Supp. 476, 477-78 (S.D. Miss.) (following "numerous cases holding that consumers do not have a protected property interest in utility rates encompassed within the scope of 'life, liberty or property' under the Fourteenth and Fifth Amendments"), *aff'd mem.*, 5 F.3d 528 (5th Cir. 1993); *Sellers v. Iowa Power & Light Co.*, 372 F. Supp. 1169, 1172 (S.D. Iowa 1974) ("utility customers have no vested rights in any fixed utility rates," citing numerous federal and state cases).

[32] This does not mean, however, that the utility itself lacks such an interest. *See Crosby*, 813 F. Supp. at 480 n.6 ("[T]he law has recognized a difference between a utility's interest (as a seller) in a specific rate and the interest of a consumer in a specific rate.")

It is also plain that Kansas law does not create any right to a hearing or to a "decision on the merits," as WNG contends. Section 66-117 provides that the KCC "may hold a hearing;" it imposes no mandatory hearing requirement. And far from granting any party the right to a "decision on the merits," the statute expressly contemplates that there may be no decision, and that the "deemed approval" provisions will take effect. Kansas has simply neither created nor recognized the "right" WNG asserts; nor does the Constitution require that Kansas do so.[33]

C. Even if WNG Had a State-Created Right to a Hearing, which it Did Not, the Right Would Not Be a Protected Property Interest under the Fourteenth Amendment

Even if the state had granted WNG a "right" to a hearing or to a "determination on the merits," the right would not be protected under the Fourteenth Amendment. As this Court has made clear,

> Process is not an end in itself. Its constitutional purpose is to protect a substantive interest to which the individual has a legitimate claim of entitlement.[34]

WNG's failure to identify any such substantive interest would be fatal to its due process claims even if it did have a right to a hearing or decision.[35] In any event,

---

[33] The "right" WNG asserts is also inconsistent with the Kansas Constitution, which provides that the KCC's rate proceedings are legislative, not judicial or quasi-judicial, acts. *Midwest Gas Users Ass'n v. Kansas Corp. Comm'n*, 623 P.2d 924, 929 (Kan. Ct. App. 1981) ("Under the constitutional separation of powers, the regulation of public utilities is legislative in nature. . . . [W]hen acting in the exercise of its delegated powers, the Commission is not a quasi-judicial body.")

[34] *Olim v. Wakinekona*, 461 U.S. 238, 250 (1983).

[35] *See Doe v. District of Columbia*, 93 F.3d 861 (D.C. Cir. 1996) (state-created procedures do not create a claim of entitlement where none would otherwise exist); *Gagliardi v. Village of Pawling*,

WNG was heard at length before the KCC, and had every opportunity to urge its positions to the KCC and to the Kansas courts. The matter was decided by application of law. WNG's position now that it was denied "notice" and a "hearing" is, in light of the history of this case, absurd.

CONCLUSION

For the foregoing reasons, WNG's petition for a writ of certiorari should be denied.

Respectfully submitted,

JAMES P. ZAKOURA
RICHARD W. HIRD
WILLIAM F. WATKINS
DAVID J. ROBERTS
SMITHYMAN & ZAKOURA, CHTD.
7300 West 110th Street
Suite 650
Overland Park, Kansas 66210
(913) 661-9800

TINO M. MONALDO
TINO M. MONALDO, CHTD.
335 North Washington
Suite 130
Hutchinson, Kansas 67501
(316) 669-9338

STANLEY M. GORINSON
Counsel of Record
JOHN LONGSTRETH
LISA M. HELPERT
PRESTON GATES ELLIS
& ROUVELAS MEEDS
1735 New York Avenue, N.W.
Suite 500
Washington, D.C. 20006
(202) 628-1700

Attorneys for Respondent
Kansas Pipeline
Partnership

December 19, 1996

---

18 F.3d 188, 193 (2d Cir. 1994) ("The deprivation of a procedural right to be heard, however, is not actionable when there is no protected right at stake."); *Jacobs, Visconsi & Jacobs Co. v. City of Lawrence*, 927 F.2d 1111, 1117 (10th Cir. 1991) ("[T]he classification by the state of the particular procedure due the applicant is insufficient, in itself, to bring that interest within the protection of the Due Process Clause.")

APPENDIX

APPENDIX

IN THE COURT OF APPEALS
OF THE STATE OF KANSAS

No. 96-75918-A

KANSAS PIPELINE PARTNERSHIP,
Petitioner,

v.

THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS,
Respondent.

You are hereby notified of the following action taken by the Court:

Motion for Rehearing En Banc by Willliams Natural Gas Company.

Denied.

KCC Docket Nos. 192,506-U and 192,507-U

Date: 07/03/96.

CAROL G. GREEN
Clerk

Supreme Court, U.S.
FILED
JAN 3 1997
CLERK

No. 96-778

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

WILLIAMS NATURAL GAS COMPANY,
Petitioner,

v.

KANSAS PIPELINE PARTNERSHIP,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of Kansas

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

GARY W. BOYLE
COUNSEL OF RECORD
THE WILLIAMS COMPANIES, INC.
4100 ONE WILLIAMS CENTER
TULSA, OKLAHOMA 74172
(918) 588-2359

JAY V. ALLEN
THE WILLIAMS COMPANIES, INC.
4100 ONE WILLIAMS CENTER
TULSA, OKLAHOMA 74172

14 pp

RULE 29.6 STATEMENT

Petitioner Williams Natural Gas Company is a wholly owned subsidiary of The Williams Companies, Inc. Other subsidiaries of The Williams Companies, Inc., that are not wholly owned by that corporation are as follows:

Altra Energy Technologies L.L.C.
American Soda, L.L.P.
Apco Argentina Inc.
Free Port Terminal Co. Limited
Kern River Gas Supply Corp.
Kern River Gas Transmission Co.
Kern River Service Corp.
Kiowa Gas Storage, L.L.C.
Nebraska Energy, L.L.C.
NES Supply Corp.
Northern Border Intermediate Limited Partnership
Northern Border Partners, L.P.
Parkco, L.L.C.
Pekin Energy Co.
Reserveco Inc.
TransNetwork Holding Co.
Tubexpress, Inc.
Williams Field Services-Gulf Coast Co., L.P.
Wiljet, L.L.C.

TABLE OF CONTENTS

RULE 29.6 STATEMENT i

TABLE OF AUTHORITIES iii

REPLY TO COUNTERSTATEMENT OF THE CASE AND REASONS FOR DENYING THE WRIT 2

I. STATUTORY BACKGROUND 2

II. COMPETITIVE FRAMEWORK 4

III. STATE LAW 5

IV. JURISDICTION 5

V. PRUDENTIAL STANDARDS 8

CONCLUSION 10

TABLE OF AUTHORITIES

Court Cases

Burns v. United States, 501 U.S. 129 (1991) 3

In re Gault, 387 U.S. 1 (1967) 4

Logan v. Zimmerman Brush Co., 455 U.S. 422 (1981) . . . 2

Plyler v. Dole, 457 U.S. 202 (1982) 4

Rice v. Sioux City Mem'l Park Cemetery
349 U.S. 70 (1955) 9

TXO Prod. Corp. v. Alliance Resources Corp., 509 U.S. 443
(1993) 4

Statutes and Rules

Kan. Stat. Ann § 66-117 (1995) 2

Kan. Sup. Ct. R. 8.03(e)(1) 7

Sup. Ct. R. 15.6 2

No. 96-778

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

WILLIAMS NATURAL GAS COMPANY,

Petitioner,

v.

KANSAS PIPELINE PARTNERSHIP,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of Kansas

REPLY BRIEF OF PETITIONER WILLIAMS NATURAL GAS COMPANY

The apparent overarching purpose of Kansas Pipeline Partnership's ("KPP") Response to Williams Natural Gas Company's ("WNG") Petition for Certiorari is to obfuscate the issues and hide the reality that this case presents an important issue of federal constitutional law for this Court's review. The great majority of the facts and history supplied by KPP has nothing to do with the merits of WNG's Petition or the factors

the Court typically weighs when determining whether to grant certiorari. A consideration of those factors without the interference of irrelevant facts and arguments strongly suggests that the Court should review the decision of the Kansas Court of Appeals.[1]

REPLY TO COUNTERSTATEMENT OF THE CASE AND REASONS FOR DENYING THE WRIT

I. STATUTORY BACKGROUND

KPP argues that the law with respect to "deemed approval" statutes is well-settled and should, therefore, not be addressed by the Court.[2] In doing so, KPP ignores several important facts. First and foremost, the lack of a decision interpreting a statutory scheme that offends the most fundamental concepts of due process does not render the question "long-settled" or "noncontroversial." Quite to the contrary, the 14th Amendment and the Court's interpretations of constitutional due process[3] strongly suggest that, even in the absence of any decisions interpreting Kan. Stat. Ann. § 66-

---

1 WNG will not address issues raised by KPP that were discussed in WNG's Petition for Certiorari. Sup. Ct. R. 15.6. Chief among those issues is whether WNG has a constitutionally protected property interest. Brf. in Opp. at 20-24. Even if WNG's interest is not protected by the Constitution, the interest of Kansas ratepayers is protected. That interest has filed in support of WNG's Petition through its statutory representative, the staff of the Kansas Corporation Commission ("KCC"). Moreover, the ratepayers represented by the Kansas Citizens' Utility Ratepayer Board ("CURB") certainly have a protected interest as the party responsible for paying for the contracts KPP proposed. CURB filed its own Petition in Docket No. 96-956 raising the same issue presented here.

2 Brf. in Opp. at 5.

3 Logan v. Zimmerman Brush Co., 455 U.S. 422, 434-35 (1981).

117(b) (the "Statute"), the validity of the Statute, and specifically the interpretation of the Statute rendered by the Kansas Court of Appeals, is quite clearly unsettled and controversial. KPP's attempt to recast WNG's argument should be rejected.

WNG does not claim that time limits are new or even that no time limit statute can be sustained. Rather, WNG's Petition raises a specific constitutional infirmity in a statute as applied by the Kansas Court of Appeals. That application is new and deprives WNG of its right to due process of law. The issue presented by WNG's Petition is exactly the sort of issue the Court has reviewed in the past and should review here.

Much of KPP's response is devoted to a policy justification for the substance of the Statute.[4] While that discussion may be of some political significance, it means nothing in the face of this due process challenge. The wisdom of the Kansas legislature in enacting the Statute says absolutely nothing about whether WNG was entitled to due process or whether the process WNG received was the process it was due.[5] Similarly, the thinking of the Kansas legislature says nothing about whether the issue presented here is important or whether the law is unsettled. The issue presented in WNG's Petition is an important unsettled question of federal constitutional law and should be reviewed by the Court.

---

[4] Brf. in Opp. at 3-5.

[5] E.g., Burns v. United States, 501 U.S. 129, 146-48 (1991).

II. COMPETITIVE FRAMEWORK

KPP's lengthy statement and argument about the history of competition between WNG and KPP[6] is another transparent attempt to shift the Court's focus from an important constitutional issue to a variety of competitive issues that have been the subject of other administrative and court proceedings, none of which are before the Court. WNG is entitled to the same due process protection whether or not it competes with KPP and regardless of which entity has a greater share of the market. WNG's rights are the same even if KPP's somewhat veiled allegations of competitive wrong-doing are correct.[7] Of even less impact is the nature or duration of the contractual relationship between WNG and Western Resources, Inc. ("WRI").[8]

KPP's continual suggestions of inappropriate competition by WNG are its predictable response when faced with legitimate arguments. Those allegations, however, do not impact WNG's due process rights or the merits of its constitutional claim.

---

[6] Brf. in Opp. at 5-8.

[7] Plyler v. Dole, 457 U.S. 202, 210 (1982) (illegal aliens); see In re Gault, 387 U.S. 1, 80 (1967) (Stewart, J., dissenting) ("A State in all its dealings must, of course, accord every person due process of law."). Due process review is available for awards of punitive damages. TXO Prod. Corp. v. Alliance Resources Corp., 509 U.S. 443 (1993). Thus, even those corporations who have been found culpable are afforded due process protection.

[8] Brf. in Opp. at 8, n. 15.

III. STATE LAW

WNG disagrees with the substantive interpretation of the Statute by the Kansas courts and does not attempt to hide that fact from this Court.[9] WNG's Petition, however, is based strictly on the important federal question presented by the case. The Petition is addressed only to the constitutionality of the Statute as applied by the Kansas Court of Appeals. That application resulted in a final decision without the benefit of a hearing and decision on the merits. The failure to permit a decision on the merits at some point in the process is a clear violation of WNG's due process rights. The Kansas Court of Appeals incorrectly interpreted the Statute, but that fact does not impact WNG's Petition and is not before the Court.

WNG does not argue that its constitutional rights are violated by a lack of uniformity of judicial decisions, by judicial error, or by misapplication of state law as KPP has attempted to argue.[10] Instead, WNG asserts that its due process rights have been impaired by a statute that, based on the interpretation of the Court of Appeals, denies WNG the right to a decision on the merits.

IV. JURISDICTION

KPP's jurisdictional claim rests primarily on the argument that WNG had an opportunity to raise its due process argument earlier but waived the issue by failing to raise it. That claim is unsupported by the record.

---

[9] Pet. for Cert. at 4, n.4.

[10] Brf. in Opp. at 17.

The KCC began this proceeding by determining that the 240-day time limit imposed by the Statute, if it applied at all, was started anew by the intervention of the Federal Energy Regulatory Commission's ("FERC") claim of jurisdiction over KPP. WNG had no occasion to question the KCC's ruling or seek rehearing because that decision did not deprive WNG of its constitutional right to due process of law. Similarly, when the KCC issued its decision after rehearing, WNG had no reason to complain because its due process rights had not been impaired. This is the sole reason that WNG did not cross-petition for review and the sole reason the issue was not included in WNG's filings with the KCC or in its briefs filed with the Court of Appeals.

In its argument to the Court of Appeals, WNG, consistent with its position throughout this proceeding, supported the KCC's conclusion that the Contracts were not deemed approved by operation of law. There was no reason to make a constitutional argument because at that point there was no constitutionally infirm decision. It was only when the Court of Appeals determined that the Contracts had been approved, although there had never been a decision on the merits, that WNG's due process rights were offended. WNG then raised its constitutional claims at the earliest possible time, by a motion for rehearing with the Court of Appeals, and reasserted those claims in its Petition for Review addressed to the Kansas Supreme Court.

KPP argues that review by the Kansas Supreme Court was discretionary and therefore the denial of review must necessarily be based on WNG's failure to raise the constitutional issue at the appropriate time.[11] The decision of the Kansas Supreme Court includes no such ruling, however.

---

[11] Brf. in Opp. at 14-15.

In fact, it is apparent that the Kansas Supreme Court's decision was based on its disagreement with WNG's interpretation of constitutional due process rather than a defect in raising the issue. It is clear from the discussion above that the due process issue arose for the first time following the decision of the Kansas Court of Appeals. Thus, under Kansas law, if WNG's constitutional argument had merit, appeal to the Kansas Supreme Court was by right.[12] That court's decision not to review the matter must therefore have been a determination that WNG's constitutional argument had no merit. This Court clearly has jurisdiction to review that decision.

The jurisdictional issue is easily resolved by understanding the manner in which the due process issue arose. The Court will recall that WNG does not complain about any action or interpretation by the KCC, the initial trier of fact. Instead, WNG's constitutional challenge is directed solely to the interpretation of the Statute included in the decision of the Kansas Court of Appeals. This fact not only distinguishes this matter from the cases cited by KPP[13], but also explains quite clearly why WNG did not raise its constitutional argument until its request for rehearing before the Court of Appeals. This Court's jurisdiction is not removed when the party raising a constitutional question raises it at the earliest time possible following the unconstitutional statutory interpretation.

---

[12] Kan. Sup. Ct. R. 8.03(e)(1). The rule provides that only cases in which the constitutional issue arises for the first time in the opinion of the Court of Appeals can be appealed as a matter of right. If KPP's theory were correct, no case would result in mandatory appeal because a constitutional issue not raised prior to the Court of Appeals' opinion would be waived. KPP's circular argument should be rejected.

[13] Brf. in Opp. at 14-16.

V. PRUDENTIAL STANDARDS

KPP's prudential arguments are entirely without merit. KPP first suggests that WNG has received benefits from the Statute and may not now argue that it is unconstitutional.[14] KPP's argument is factually incorrect. WNG did not submit pleadings under the authority of the Statute. In fact, WNG argued before the KCC that this was a rate case and therefore subject to the procedures outlined in the Statute, in addition to other procedural protections. The KCC specifically denied WNG the benefits it sought from the Statute.[15] WNG has never sought compensation under the Statute and KPP makes no allegation that WNG has received such compensation. KPP's claim that WNG received benefits from the Statute is wrong because it is based on facts that are clearly false.

KPP next suggests that if the Court declares the Statute unconstitutional, WNG will be unable to receive the relief it seeks.[16] KPP argues that the KCC's suspension of the Contracts will be ineffective if the Statute is unconstitutional and the Contracts will be effective as a result. KPP's argument misconstrues the relief sought by WNG. WNG asks the Court to invalidate the Court of Appeals' interpretation of the Statute, which removes the right to a decision on the merits. There are several ways to achieve that end. To avoid the due process problem, the Contracts could have gone into effect after the statutory period subject to the later decision of the KCC on the merits of the application. In fact, several state statutes reach

---

[14] Id. at 18.

[15] Pet. for Cert. at 11-12.

[16] Brf. in Opp. at 18-19.

exactly that result.[17] Alternatively, the Statute, contrary to KPP's assertion, can be severed so that the only constitutionally offensive provision, the "deemed approved" language, is excised from the Statute. In either case, WNG would be entitled to a decision on the merits, which is all the relief it seeks here.

KPP's final prudential argument relies on its assertion that this case is or may become moot in the near future.[18] KPP's argument is wrong because this case represents a real, on-going dispute among the parties that is neither academic nor episodic.[19] KPP argues that through the transfer of interests in the Contracts and the potential assertion of federal jurisdiction by FERC, the KCC may no longer have jurisdiction to determine the merits of this dispute by the time this Court decides the case. This assertion might be true if the pending matters consisted only of KPP's effort for authority to put a single contract into effect. In reality, this case involves much more. The decision of the Court of Appeals gave approval not just to a single contract but also to several other contracts that continue to be subject to KCC jurisdiction. Moreover, this case also involves $5.9 million in project development costs. KPP currently claims at FERC that the decision of the Court of Appeals means KPP is entitled to recover those project development costs and that FERC should adopt that conclusion even though there has been no ruling on the merits. This Court's decision will clearly resolve that very real issue even if FERC finally takes jurisdiction and KPP assigns the Contracts to others. In short, there is nothing FERC can do by taking

---

[17] Pet. for Cert. at 16-17 & n.28.

[18] Brf. in Opp. at 19-20.

[19] Rice v. Sioux City Mem'l Park Cemetery, 349 U.S. 70, 74 (1955).

jurisdiction, or that KPP can do by assigning the Contracts, that will render this dispute moot.

CONCLUSION

When the Court clears away the irrelevant matter raised by KPP it is left with KPP's jurisdictional and prudential claims. This Court has jurisdiction over the due process claim because WNG raised the issue at the first possible juncture, which in this case occurred at the rehearing stage in the Court of Appeals. KPP's claim that the issue should have been raised at the KCC is spurious because the KCC did not violate WNG's due process rights. KPP's prudential arguments are similarly flawed. WNG did not accept compensation under the Statute, the relief WNG seeks is available, and there is no chance that this case is or will become moot.

WNG's Petition raises a real and important Federal Constitutional question. The Court should grant the Petition and resolve the clear conflict between the 14th Amendment and the Statute as applied by the Kansas Court of Appeals.

Respectfully submitted,

Gary W. Boyle
Counsel of Record

Jay V. Allen
The Williams Companies, Inc.
4100 One Williams Center
Tulsa, Oklahoma 74172
(918) 588-2359

Attorneys for Petitioner
Williams Natural Gas Company

January 3, 1997